(17,584.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 166.

THE HOMER RAMSDELL TRANSPORTATION COMPANY, PLAINTIFF IN ERROR,

vs.

LA COMPAGNIE GENERALE TRANSATLANTIQUE.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 2, 1900.

1 United States Circuit Court of Appeals for the Second Circuit.

THE HOMER RAMSDELL TRANSPORTATION COMPANY, Plaintiff in Error,
against
LA COMPAGNIE GENERALE TRANSATLANTIQUE, Defendant in Error.

SIR: You will please take notice that a proposed order herein, of which a copy is hereto annexed, will be presented at the office of the clerk of the above-named court on the 24th day of November, 1899, at 10.30 o'clock in the forenoon of that day, for presentation to the judges thereof for settlement.

Dated New York, November 23rd, 1899.

Yours, etc.,
JONES & GOVIN,
Att'ys for Defendant in Error.

To E. L. Fancher, Esq., att'y for plaintiff in error.

2 United States Circuit Court of Appeals for the Second Circuit.

THE HOMER RAMSDELL TRANSPORTATION COMPANY, Plaintiff in Error,
against
LA COMPAGNIE GENERALE TRANSATLANTIQUE, Defendant in Error.

This cause came on to be heard and is now pending in this court upon a writ of error to the circuit court of the United States for the southern district of New York to review the judgment rendered in the above entitled suit by the said circuit court, dismissing the plaintiff's complaint with costs and disbursements of this action, upon the report of a referee appointed to hear and determine all the issues in the said action.

The defendant in error is a foreign corporation, owning and plying a regular line of steamers between Havre and New York. On the morning of December 10th, 1892, one of the defendant's steamers, "La Bretagne," while outward bound from the port of New York to Havre by way of Sandy Hook, with cargo and passengers, struck the plaintiff's pier, damaging it to the amount of upwards of thirteen thousand (13,000) dollars. The said vessel at the
3 time she left her pier was in all respects seaworthy and properly manned, equipped, and supplied, and her owner exercised due diligence to make her so. She had on board a Sandy Hook pilot, duly licensed under and pursuant to the laws of the State of New York, and was navigated under his direction up to the time of said collision, and all his orders were promptly and efficiently obeyed and carried out by the master, officers, and crew of said steamship.

The said collision and the damage resulting therefrom were caused solely by the negligence and want of skill and care on the part of the said pilot and not by any want of skill or negligence on the part of the master, other officers, or crew of the said steamship.

Certain questions of law arise in the cause concerning which the court desires the instructions of the Supreme Court for its proper decision and which are as follows:

First. Whether the provisions of chapter 467 of the laws of New York passed June 28, 1853, as amended by chapter 196 of the laws of said State passed April 11, 1854; chapter 243 of the laws of the said State passed April 3rd, 1857; chapter 930 of the laws of the said State passed May 16, 1867, and chapter 548 of the laws of said State passed May 2, 1870, and consolidated into sections 2093 to 2123, inclusive, of chapter 410 of the laws of said State passed July 1, 1882,
impose compulsory pilotage on foreign vessels inward and
4 outward bound to and from the port of New York by way of
Sandy Hook, in view of the decisions of the New York court of appeals.

Second. Whether in an action at common law the ship-owner is liable for injuries inflicted exclusively by negligence of a pilot accepted by a vessel compulsorily.

In accordance with the provisions of section 6 of the act of March 3, 1891, establishing circuit courts of appeal, etc., the foregoing questions of law are by the circuit court of appeals hereby certified to the Supreme Court.

And it is ordered that the clerk of this court do certify the pleadings, the report, and the opinion of the said referee, together with the judgment of the said circuit court entered upon the said report, and transmit the same to the Supreme Court for its inspection and examination in answering and determining the said questions.

Dated New York, March 18th, 1899.

WM. J. WALLACE,
U. S. Circuit Judge.
E. HENRY LACOMBE, *U. S. C. J.*
N. SHIPMAN, *U. S. Circuit Judge.*

5 United States Circuit Court for the Southern District of New York.

(Action removed from the supreme court of the State of New York.)

THE HOMER RAMSDELL TRANSPORTATION Company *against* THE COMPAGNIE GENERALE TRANSATLANTIC (a Foreign Corporation, Known as the French Line of Mail Steamers).	Amended Complaint. Trial to be Had in the City and County of New York.

The complaint of the above-named plaintiff respectfully alleges:

1. The plaintiff, The Homer Ramsdell Transportation Company, is a domestic corporation now existing, and organized and incorporated January 6, 1880, under and pursuant to the provisions of

the act of the legislature of the State of New York, being chapter 40, Laws of 1848, entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical, chemical, agricultural, horticultural, medical or curative, mercantile or commercial purposes, passed February 14, 1848, and the several acts of said legislature, supplementary and amendatory thereof (see 3 R. S., 8th ed., p. 1953 *et seq.*), and ever since said organization and incorporation, the said Homer Ramsdell Transportation Company has been, and still is, in lawful existence and operation, carrying on the business of transporting freight and passengers and propelling steamers by steam power on the Hudson river, in said State, between the city of Newburgh and the city of New York, in said State.

6 2. For the purpose of such transportation business one of plaintiff's incorporators, Homer Ramsdell, entered into and received from the mayor, aldermen and commonalty of the city of New York by the board of docks, thereto duly authorized, an indenture of lease, made and dated on the 28th day of August, 1889, by and between the said the mayor, aldermen and commonalty of the city of New York by the board of docks, parties of the first part, and the said Homer Ramsdell, of Newburgh, Orange county, N. Y., party of the second part, whereby the said parties of the first part to the said lease, granted, bargained, sold, demised and assigned unto the said Homer Ramsdell, party of the second part, and his assigns, for the term of ten years from the first day of February, 1889, all and singular, the wharfage which may arise, accrue, or become due for the use and occupation in the manner and at the rates prescribed by law, of

All that certain public wharf property situated on the North river, in the city and county of New York, and known and described as follows, to wit: Pier number twenty-four (24), new, near the foot of Franklin street, including the spurs or triangular projections or extensions on the sides thereof, and the right to use and occupy the same for the special kind of commerce carried on by steam transportation.

Together with the right to enter upon the said wharf property for the purposes of said lease, and to collect the said wharfage, and to use and occupy the same, as aforesaid, with a covenant of renewal, of the said lease for a further term of ten years on the terms and conditions therein specified.

And in and by the said indenture of lease it was provided, among other things, as follows, to wit:

"And the said parties of the first part hereby grant and permit to the said party of the second part the right to erect, construct
7 and maintain upon the said pier, during the terms of these presents, including the renewal thereof, if any, as herein provided, a shed, said shed to be erected in accordance with the laws and regulations in such cases made and provided, and in conformity with the plans and specifications submitted therefor, which have been approved, the work to be done under the direction and supervision of the engineer-in-chief of the department of docks."

And it was further provided in and by the said lease as follows: "And the said party of the second part covenants and agrees that he will, at all times during said term, including any renewal thereof, put, keep and maintain the said wharf property, and every part thereof, and the structure thereon, including the said shed, spurs or triangular projections or extensions, in such good and sufficient repair and condition as the board of docks shall reasonably require and deem necessary, under the direction and supervision of the proper officer of the department of docks, and that all such repairs during said term, or any renewal thereof, shall be done at the sole cost, charge and expense of the said party of the second part, his representatives or assigns;" and the said lease was immediately thereafter duly assigned to the plaintiff, and the plaintiff assumed all the obligations and covenants of the said Homer Ramsdell in and respecting the same and the said pier.

3. Ever since the execution of the said lease the said plaintiff has been thereunder in the occupancy and possession of said pier, new No. 24, North river, and has carried on there its transportation business by its steamboats from Newburgh, aforesaid, to the said pier, and is the owner thereof, and of the shed thereon.

And of late the dock department has extended the said
8 pier in connection with the said lease, and subject to the provisions thereof, so that until the collision hereinafter named, the said pier was six hundred and seventy-one feet in length by sixty feet wide, and was with the shed thereon, in use by the plaintiff, as such assignee and owner.

Portions of the said pier were sublet by the plaintiff to other steamboat transportation companies coming from other places on the Hudson river, and plaintiff was in receipt of rents from such other transportation companies, which rents have been suspended and lost in consequence of the said collision.

4. The defendant is a foreign corporation under the name of Compagnie Generale Transatlantique, organized and existing under the laws of the Republic of France, and is generally known as the French line of mail steamers, between Havre and New York. Between said Havre, a port in France, and the port of New York, the defendant is engaged in the business of plying certain steamers for freight and passengers, one of which steamers is named La Bretagne.

5. At about 8.30 a. m. on the 10th of December, 1892, the defendant's said steamship, La Bretagne, while outward bound from the port of New York, having shortly before left her pier on the North river, struck the said pier new No. 24 in the occupancy of the plaintiff, and did the following damage thereto:

Said steamship La Bretagne struck the north side of the said pier and cut through the same to within about fifteen feet of the southerly side of the pier, destroying the same and breaking the piles, caps and other portions thereof, on which the same was placed, as well as moving the floor of the same several feet southward, and also breaking down and destroying a portion of the plaintiff's shed on the said pier; and causing damage to the said pier
9 and shed to the amount of thirteen thousand dollars.

Said collision also damaged and injured the residue of the

said pier, and such damage has been, since the occurrence thereof, necessarily repaired by the plaintiff under the supervision of the proper officer of the dock department, at the expense of the plaintiff to the amount of $13,153.34.

6. In addition to the said immediate damage above mentioned plaintiff is injured by the said collision of the said steamship by having been deprived of the use of the said pier in the damaged portions thereof during the time of said reparation, and also by being prevented from completing a lease to other transportation companies for the use of the same to the extent of about two thousand dollars.

Also the plaintiff has been damaged by the said collision in the loss of rent on the said pier, paid by the plaintiff to the dock department for the time of said repairs, to the amount of $2,000 on the outer extension of the pier, and to a further amount of $2,000 on the residue of the pier.

The aforesaid collision, and damages resulting therefrom, were caused solely and only by the negligence and unskillful management of the said steamship La Bretagne, and the officers and agent of the defendant in charge thereof, and by reason of the negligence and wrongful act of the defendant and its agent, servants and the officers and other person or persons employed by the defendant or under its authority.

7. Said plaintiff, under said lease and assignment and assumption of its covenants, is liable to the dock department and the city of New York, and has been required to rebuild said pier and shed, and to repair the damages to the said pier and shed, and a notice to effect such repairs has already been served from the dock department on the plaintiff.

10 The said defendant has property now within the State and city of New York in and upon the said steamer La Bretagne now moored at the foot of Morton street, on the North river, and also property in the office of the said company at No. 3 Bowling Green, in the city of New York.

Wherefore the said plaintiff asks of this honorable court an attachment pursuant to the provisions of the Code of Procedure, to be issued against the said foreign corporation, the defendant, above named.

And also demands judgment in this action against the said defendant for the sum of eighteen thousand dollars for the aforesaid damages of the plaintiff in the premises, with interest on that sum from December 21, 1892, and the costs of this action.

E. L. FANCHER,
Attorney for Plaintiff.

CITY AND COUNTY OF NEW YORK, *ss:*

Homer S. Ramsdell, being duly sworn, says: That he is the secretary of the above-named plaintiff, and has read the aforegoing complaint and knows the contents thereof. That the same is true to the knowledge of deponent, except as to the matters therein

stated to be alleged on information and belief and that as to those matters he believes it to be true.

HOMER S. RAMSDELL.

Sworn this 3d day of April, 1893, before me.

WILLIAM H. HARRIS,
Notary Public, New York County.

11 Circuit Court of the United States, Southern District of New York.

THE HOMER RAMSDELL TRANSPORTATION COMPANY, Plaintiff,
against
THE COMPAGNIE GENERALE TRANSATLANTIQUE, Defendant.

The above-named defendant, answering the amended complaint of the above-named plaintiff, alleges:

As a first defense.

First. The defendant has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph or division of the said amended complaint marked "1," and, therefore, denies the same.

Second. The defendant has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph or division of the said amended complaint marked "2," and, therefore, denies the same.

Third. The defendant has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph or division of the said amended complaint marked "3," and, therefore, denies the same.

12 Fourth. The defendant admits the allegations contained in paragraph or division of the said amended complaint marked "4."

Fifth. The defendant admits that at about 8.30 a. m. on the 10th day of December the steamship La Bretagne while outward bound from the port of New York, having shortly before left her pier on the North river, struck pier new No. 24, as alleged in paragraph or division of the said amended complaint marked "5," but the defendant has no knowledge or information sufficient to form a belief as to any of the other allegations contained in said paragraph or division of the said amended complaint marked "5," and, therefore, denies the same.

Sixth. The defendant has no knowledge or information sufficient to form a belief as to the allegations as to the plaintiff's alleged damages contained in paragraph or division of the said amended complaint marked "6," and, therefore, denies the same; and this defendant denies that the aforesaid collision, and damages resulting therefrom, were caused solely and only by the negligence and unskillful management of the said steamship La Bretegve, and the officers and agent of the defendant in charge thereof and by reason

of the negligence and wrongful act of the defendant and its agent servants and the officers and other person or persons employed by the defendant or under its authority.

Seventh. The defendant has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph or division of the said amended complaint marked "7," and, therefore, denies the same, except that the defendant admits that at the date of the verification of the said amended complaint it had property within the State and city of New York in and upon the said steamer La Bretagne, then moored at the foot of Morton
13 street, on the North river, and also property in its office at No. 3 Bowling Green, in the city of New York.

Second defense.

And the said defendant, further answering the said amended complaint, alleges, upon information and belief, as a second defense:

That the wharf or pier mentioned in the said amended complaint, and with which the defendant's said steamship, La Bretagne, collided at the time stated in the said amended complaint, is, and was at the said time of the said collision, an unlawful structure, an obstruction to navigation, and as such a public nuisance to a national highway of commerce, to wit, the North or Hudson river, through which the said steamer was lawfully passing at the time of the said collision, and at a place where she was, by reason of the exigencies of navigation, obliged to pass, and that the free navigation of the stream or river upon which the said wharf or pier is, and was, erected, as aforesaid, is, and was, interfered with and impeded, which obstruction, interference and impediment prevented the said steamship from freely manœuvring and passing clear of the same, and, therefore, caused the collision stated in the amended complaint.

Third defense.

And the said defendant, further answering the said amended complaint, alleges, as a third defense:

That, at the time of the said collision, the said steamship, La Bretagne, was in the command, and her movements and navigation entirely under the orders and direction, of a pilot, duly licensed under, and compulsorily imposed upon the defendant by,
14 the authority of the State of New York, and that the regular officers and crew of the said steamship in the service of the defendant had no part in the navigation of the said steamer except to carry out or execute the orders of the said pilot, which they did promptly and efficiently in every particular.

Fourth defense.

And the said defendant, further answering the said amended complaint, alleges, as a fourth defense:

First. That, at the time of the said collision, the said steamship, La Bretagne, was in the command, and her movements and navigation entirely under the orders and directions, of a pilot, licensed

and compulsorily imposed upon the defendant by the public authority of the State of New York, as aforesaid, and, therefore, one of the public servants of the said State, and not a servant of the defendant, and that the regular officers and crew of the said steamship in the service of the defendant had no part in the navigation of the said steamer except to carry out or execute the orders of the said pilot, which they did promptly and efficiently in every particular, as also aforesaid.

Second. That, by virtue of various charters and laws, to which the defendant prays leave to particularly refer, and prove upon the trial of this action, there is, and was at the time of the said collision, duly created and erected within, and as a part of, the said State, a municipality thereof known as the mayor, aldermen and commonalty of the city of New York, and that the water front and riparian rights, including the right to erect and maintain a bulkhead, wharf or pier on the land and land under water bordering the river or stream in which the said collision occurred has been, and was at the time of the said collision, among many other parts of the said water front, above and below, entrusted to the said municipality for public purposes, and that the said wharf or pier has been erected, and was, at the time of the said collision, maintained in ostensible and alleged pursuance of such trust or privilege, so conferred upon the said municipality, and was, therefore, a part of the public property or domain of the said State of New York.

Wherefore, the defendant demands judgment that the said plaintiff's amended complaint be dismissed, with the costs and disbursements of this action.

JONES & GOVIN,
Defendant's Attorneys, 45 *Cedar Street, New York City.*

UNITED STATES OF AMERICA, *Southern District of New York*, } ss.:

A. Forget, being duly sworn, deposes and says: That he is the general agent of the above-named defendant for the United States and Canada; that the foregoing amended answer is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

A. FORGET.

Sworn to and subscribed before me this 1st day of May, 1895.

FREDERICK KOPF,
[SEAL.] *Notary Public* (34), *N. Y. Co.*

16 Circuit Court of the United States, Southern District of New York.

THE HOMER RAMSDELL TRANSPORTATION COMPANY, Plaintiff,
against
LA COMPAGNIE GENERALE TRANSATLANTIQUE, Defendant.

Referee's Report.

To the honorable the circuit court of the United States for the southern district of New York:

Pursuant to an order of this court, entered herein on the
17 16th day of October, 1893, referring it to me to hear and determine the issues in this action and to report my decision thereon, I, the undersigned, as said referee, do hereby respectfully report that the oath prescribed by the New York Code of Civil Procedure was expressly waived by the parties, and having heard the allegations and evidence of the parties, and having been attended by Enoch L. Fancher and William H. Harris, Esquires, for the plaintiff, and Edward K. Jones and William H. Blymyer, Esquires, for the defendant, and after due deliberation, I decide and find as follows:

Findings of Fact.

First. The plaintiff is a domestic corporation now existing and incorporated January 6, 1880, as alleged in the first paragraph of the amended complaint. It carries on the business of transporting freight and passengers and propelling steamers by steam power on the Hudson river, between the city of Newburgh and the city of New York.

Second. For the purpose of such transportation business Homer Ramsdell, one of the plaintiff's incorporators, entered into and received from the mayor, aldermen, and commonalty of the city of New York, by the board of docks, thereto duly authorized an indenture of lease, made and entered into on the 28th day of August, 1889, as parties of the first part, whereby the said Homer Ramsdell and his assigns were granted for the term of ten years from the 1st of February, 1889, all that certain public wharf property situated on the North river, in the city and county of New York, and known and described as follows, to wit: Pier number twenty-four (24), new, near the foot of Franklin street, including the spurs or triangular projections or extensions on the sides thereof, and the right to use and occupy the same for the special kind of commerce carried
18 on by steam transportation, together with the right to enter upon the said wharf property for the purposes of said lease, and to collect the said wharfage, and to use and occupy the same as aforesaid, with a covenant of renewal of the said lease for a further term of ten years, on the terms and conditions therein specified.

And the said lessors thereby granted permit to the said Homer Ramsdell to erect and maintain upon the said pier, during the said

term, and any renewal thereof, a shed, to be erected in accordance with the laws and regulations in such cases provided.

And it was further provided, in and by the said lease, as follows:

"And the said party of the second part covenants and agrees that he will at all times during said term, including any renewal thereof, put, keep and maintain the said wharf property and every part thereof and the structure thereon, including the said shed, spurs or triangular projections or extensions, in such good and sufficient repair and condition as the board of docks shall reasonably require and deem necessary, under the direction and supervision of the proper officer of the department of docks, and that all such repairs during said term, or any renewal thereof, shall be done at the sole cost, charge and expense of the said party of the second part, his representatives or assigns."

Third. Immediately after receiving the said lease said Homer Ramsdell assigned to the plaintiff corporation the said lease and all rights and privileges thereby granted, and the plaintiff assumed all the obligations and covenants of the said Homer Ramsdell contained in the said lease respecting the said pier and shed. The said assignment of lease to the plaintiff and the agreement of the plaintiff to assume all the covenants and liabilities therein contained, were both dated and acknowledged on the 23d of November, 1889.

19 Fourth. Ever since the execution and assignment of the said lease said plaintiff has been thereunder in the occupancy and possession of said pier, new number twenty-four (24), North river, and of the shed built thereon, and has carried on its said transportation business by the said steamboats from Newburgh, as aforesaid, to the said pier, until it was deprived of the use of a portion thereof by the collision therewith of the defendant steamer, the La Bretagne, as hereinafter stated.

Fifth. At the time of the collision hereinafter named the said pier was six hundred and seventy-one feet in length by sixty feet wide, and was, with the shed thereon, in use by the plaintiff as such assignee.

Sixth. Portions of the said pier and shed were sublet by the plaintiff to other steamboat transportation companies plying their steamers on the Hudson river, and the plaintiff was therefrom in the receipt of rents from such transportation companies.

Seventh. Such rents have been suspended and lost in consequence of the collision hereinafter named, from the time of the said collision, December 10, 1892, to the 10th of March, 1893, and plaintiff has lost the same by reason of such collision.

Eighth. The defendant is a foreign corporation under the name of Compagnie Generale Transatlantique, organized and existing under the laws of the Republic of France, plying its steamers between Havre and New York, one of which steamers is named La Bretagne.

Ninth. At about 8:30 a. m., on the 10th of December, 1892, the defendant's said steamship La Bretagne, while outward bound

20 from the port of New York, having shortly before left her pier on the North river, struck the said pier, new No. 24, in

the occupancy of the plaintiff and did damage to the said pier and shed to the amount of thirteen thousand one hundred and fifty-three dollars and fifty-four cents, and such damage has been, since the occurrence thereof, necessarily repaired by the plaintiff under the supervision of the proper officer of the dock department, at the expense of the plaintiff to the amount of $13,153.34 of which amount $5,460 was paid by the plaintiff on the 15th of February, 1893, and $7,693 on the 15th of March, 1893.

Tenth. The plaintiff also suffered damage by the said collision in the loss of rent, as above mentioned, amounting to two thousand two hundred and fifty dollars, which loss of rent was sustained by the plaintiff on or before the 15th day of March, 1893.

Eleventh. Said plaintiff, under the said lease and assignment thereof and assumption of its covenants, became liable to the dock department of the city of New York, to repair and rebuild the said damaged pier, and the dock department served a notice on the plaintiff, requiring the plaintiff to effect such repairs immediately after the collision, which the plaintiff accordingly did with all due and proper diligence and despatch.

Twelfth. The said vessel, at the time she left her pier, No. 42 North river, was in all respects seaworthy and properly manned, equipped and supplied, and her said owner exercised due diligence to make her so. She had on board a duly licensed pilot, under and pursuant to the laws of the State of New York, and was navigated under his directions up to the time of the said collision, and all his orders were promptly and efficiently obeyed and carried out by the master, officers and crew of said steamship.

21 Thirteenth. The said pilot was not appointed by the owner of said vessel, nor by the master thereof, but the said owner and master were required and compelled by the law of the State of New York to take said pilot and to allow him to take charge of the navigation of said vessel.

Fourteenth. The said collision and the damage resulting therefrom, as aforesaid, were caused solely by the negligence and want of skill and care on the part of the said pilot, and not by any want of skill or negligence on the part of the master, other officers or crew of the said steamship.

Upon the foregoing facts I further find as

Conclusion of Law.

That the defendant is entitled to judgment dismissing the complaint herein upon the merits, with costs to the defendant to be taxed.

Dated New York, June 8, 1894.

WM. G. CHOATE, *Referee.*

22 U. S. Circuit Court, Southern District of New York.

THE HOMER RAMSDELL TRANSPORTATION COMPANY
against
THE COMPAGNIE GENERALE TRANSATLANTIQUE.

Opinion of Referee.

This is an action at common law against the owner of the steamship La Bretagne for damages caused to the plaintiff's pier No. 24 North river, under the following circumstances: The La Bretagne was lying at her dock No. 42 North river on the 10th December, 1892. About five minutes after 8 o'clock in the morning, the tide being about the last of the ebb, the La Bretagne was backed out of her slip in order to start on her voyage to Havre. She was in charge of a Sandy Hook pilot. The tide being ebb, her wheel was put hard-a-port, and she was backed toward the west side of the river as far as it is usual or safe to bring her. A tug was employed to push her stern upstream, and her engines were started full speed ahead. She began to turn down the river, but when she had reached about the middle of the river it was observed by the master and pilot, who were together on the bridge, that she had ceased to turn. The master and pilot were in consultation, and the master suggested that it might be better to stop her. The pilot, however, thought that she had still room to turn in the river, and did not immediately give the order to slow or stop; but after she had run a short distance further he gave the necessary orders to slow,
23 stop and back at full speed; but in spite of these precautions she ran into the plaintiff's pier, striking it with her bow at an angle of 45 degrees, some 20 feet or more from the end on the north side, and inflicted considerable damage.

It is claimed on the part of the defendant that there was no negligence in the management of the steamer on the part either of the master or the pilot, but at most an error of judgment, for the consequences of which no action would lie.

I think, however, that it is clear that the pilot was negligent. The cause of the arrest of the turning of the steamer was probably an under current of the new flood tide striking her bottom. It was, or should have been, evident to him before he gave the order to reverse that there was great danger of her running into the pier. He is chargeable with knowledge of the tides and currents, and cannot claim as a pilot to have been surprised at the action of the ship. He seems to have supposed that the failure of the ship to turn to starboard was temporary and would be presently overcome. In this he took too great a risk, and should have given the order to reverse sooner than he did, and thereby the accident would have been avoided.

It is claimed on the part of the plaintiff that there was negligence in going out upon the ebb tide; also in not employing two tugs instead of one to turn the stern of the ship upstream and in not continuing the use of the tug which was employed longer in that

service. It was shown, however, that the tug employed was a powerful tug; that it was customary to employ one tug and not two for this purpose, and that the tug so employed pushed against the stern as long as it was practicable to do so after the engines of the ship were started forward, and that it was necessary to start the engines forward to prevent her striking on the other side of the river. It was also proved that steamers backed out and turned in the river upon the ebb tide, and that with proper care on the
24 part of the pilot this can safely be done. These allegations of fault, therefore, appear to me to be groundless.

The next question is, whether there was any fault on the part of the master in not interposing his authority to control the action of the pilot, and to insist that he should stop the ship or back her sooner than she was stopped and backed. There seems to be no doubt of the authority of the master in an extreme case to supersede the authority of the pilot and to take charge of the ship himself where it is necessary for the safety of the ship or the avoidance of imminent danger. The cases, however, all agree that it must be an extreme case of obvious danger or incapacity on the part of the pilot to authorize such interference.

As regards the navigation of the ship, she is under the exclusive control of the pilot, and, even while the master believes that the action of the pilot is indiscreet or involves danger, it does not follow that he should interfere with the navigation. He may do his whole duty by pointing out what he conceives to be the danger, and leaving the responsibility where it is, upon the pilot.

In the case of the Maria, 1 W. Rob., 110, Dr. Lushington says: "It would be a most dangerous doctrine to hold, except under most "extraordinary circumstances, that the master could be justified in "interfering with the pilot in his proper vocation. If the two au- "thorities could so clash, the danger would be materially aug- "mented, and the interests of the owners, which are now protected "both by the general principles of law and specific enactments, "from liability for the acts of the pilot would be most severely "prejudiced. It is the duty of the master to observe the conduct "of the pilot, and in the case of palpable incompetency, whether aris- "ing from intoxication or ignorance, or any other cause, to inter- "pose his authority for the preservation of the property of his em- "ployers."

So in the Lochlibo, 3 W. Rob., 329, the same learned judge
25 says: "I should never go to the length of saying that the "mere suggestion to the pilot on the part of the master to "take in this sail, or otherwise to keep as near the South Sand "light, and *vice versa*, or to bring the ship up, was interfering, in "the legal acceptation of the term, with the duties of the pilot. "Illegal interference is of a different description. If, for example, "in this case the boatswain had called out to the man below to star- "board the helm, or, if the master had called out to port the helm, "it would be interference, but it would not be interference to con- "sult the pilot or to suggest to him that the measures pursued were

" not proper, or that other measures would, in all probability, be " attended with greater success."

In the case of the ship Marcellus, 1 Clifford, 491, Mr. Justice Clifford says: " While on board, the pilot, in the absence of the " master, has the exclusive control, and direction of the navigation " of the vessel, but if the master is present the power of the pilot " does not so far supersede the authority of the master, that the latter " may not, in case of obvious and certain disability or gross igno- " rance and palpable and imminent danger or mistake, disobey his " orders and interfere for the protection of the ship and lives of those " on board. Divided authority in a ship with reference to the same " subject-matter is certainly not to be encouraged, and can never be " justified or tolerated except in case of urgent and extreme neces- " sity. While standing by and witnessing a self-evident mistake, " manifestly and imminently endangering the ship, and certain to " cause a collision, the master should not remain silent, but might " well interpose so far, at least, as to point out the error and suggest " the proper corrective."

In the present case the master did his full duty in suggesting to the pilot the danger of proceeding, but in answer to his remonstrance, the pilot explained that he thought the ship would come round.

26 His knowledge or supposed knowledge of the tides and currents and their effects upon the ship is or should be far superior to that of the master. It is on account of this superior knowledge that the ship is obliged to employ the pilot, and I think it is clear that this case does not come within that class of cases of extreme peril or incompetency in which the master is justified or it becomes his duty to take the management and navigation of the ship out of the hands of the pilot.

The next question is, whether the owner of a ship is liable at common law for damages occasioned by the negligence of a pilot compulsorily employed.

There is no doubt in this case that the law of New York compels the ship to employ a pilot appointed by the State.

By the New York pilot law a foreign ship, when inward bound, is obliged to take the first pilot that offers his service. While the masters of certain vessels may be licensed to pilot their own vessels, it is provided in the statute that all vessels from foreign ports shall take a licensed pilot, or, in case of refusal, pay full pilotage; and it is further provided that any person not holding a license who pilots a vessel in or out of the harbor of New York shall be held guilty of a misdemeanor, and any one employing a person not holding a license to pilot a vessel, shall forfeit and pay the sum of $100.

The provision with regard to outward pilotage is that the pilot who brought in the ship has the right by himself or one of his boat's company to take her out unless he has been complained of for misconduct; subject, however, to the right of the ship-owner to object to this particular pilot, in which case the commissioners of pilots shall assign another pilot from the same boat's company to take the ship out.

3 Rev. Stat. (7th ed.), p. 2017, 2019, 2020.

If the ship-owner were at liberty to select a pilot out of a
27 class of pilots licensed by the State, it could not be held that the ship-owner was compelled to take the particular pilot employed. But the right to object to one particular pilot certainly does not make the appointment of another selected by the commissioners from the same boat's crew a voluntary appointment by the owner of the vessel of such substituted pilot.

In the case of the China, 7 Wall., 53, the majority of the court held that the New York statutes created a system of compulsory pilotage. Both the master and the owner are subjected to penalties besides their liability to pay full pilotage in case of their refusal, and as to the master such refusal is expressly made a misdemeanor. It seems to me there can be no question that the pilotage is compulsory.

The plaintiff has proceeded by a common-law action. He could not do otherwise, because the tort for which he proceeds is not a marine tort, not being consummated on navigable water. The pier injured is part of the land.

The Plymouth, 3 Wall., 20.
The Maud Webster, 8 Ben., 547.
The Neil Cochran, 1 Brown's Ad., 162.
The Ottawa, 1 Brown's Ad., 356.
The M. R. Brazos, 10 Ben., 437.

The admiralty on the foregoing authorities would have had no jurisdiction to entertain the suit for the damage done to this pier, either against the vessel or against her owner. The question involved therefore is one strictly of liability at common law.

In England it is settled after a good deal of discussion that independently of the statutes regulating the pilotage, and which exempt the owner from liability, the owner of a vessel cannot be held at common law personally liable for the negligence of a pilot whom the vessel is compelled to employ, for the reason that the ground of the liability of the owner for the negligence of those who
28 navigate the vessel is based upon the relation between the owner and the parties guilty of negligence, of master and servant or principal and agent, and that as no such relation exist between the owner and the pilot who is imposed upon him by the superior authority of the State, the reason for the liability in case of a master or crew appointed by the owner ceases. The English courts, however, hold that if the master or crew co-operate in any way in the negligent act of the pilot or the damage is caused by their disobedience of his orders, the owner is liable. To exempt the owner the fault must be that of the pilot alone. The principal English cases are the following:

The Maria, 1 W. Rob., 102.
The Protector, 1 W. Rob., 54.
The Agricola, 2 W. Rob., 19.
The Neptune 2nd, 1 Dods, 467.
The Christiana, 7 Moore P. C. C., 171.
The Geraloms, 3 Hagg., 169.
Bennett *v.* Morta, 7 Taunton, 258.

Att'y General *v.* Case, 3 Price.
The Annapolis, Lush., 312.
Caruthers *v.* Sydebotham, 4 M. & S., 77.
The Halley L. R., 2 Ad. & Ec., 3 S. C. L. R., 2 P. C., 201.

And the rule so established is quite in accordance with the general principle of the law of master and servant or principal and agent, which holds one person liable for the tortious act of another only where the person committing the wrong is employed by the person sought to be held.

The mere fact that the person sought to be held derives some benefit in an indirect way from the act done is not enough if the person committing the wrong is employed by another party exercising an independent employment. Thus a party hiring a carriage of a livery-stable keeper is not liable for the negligence of
29 the driver, and the butcher employing a licensed drover to lead a bullock through the city is not liable for the negligence of the servant of the drover, and a railroad company is not liable for the negligent act of the servant of the contractor who builds the road.

Laugher *v.* Pointer, 5 B. & C., 547.
Milligan *v.* Wedge, 12 A. & E., 737.
Reedie *v.* R'y Co., 4 Exch., 241.

In this country the question of the liability of the owner of a ship for the act of a compulsory pilot has received considerable discussion, but there appear to be only two cases in which the point has been directly decided that the owner is liable *in personam* in such case. These are the cases of Bussy *v.* Donaldson, 4 Dal., 206, by the supreme court of Pennsylvania decided in 1800, and Williamson *v.* Price, 4 Martin (N. S), 399, decided in 1826 by the supreme court of Louisiana. There are dicta, however, to the same effect in other cases in this country, and especially in the case of the China, *supra*, where Mr. Justice Swayne, delivering the opinion of the court, disapproves of the rule of the English cases, and cites with approval the case of Bussy *v.* Donaldson. The case of the China, however, was the case of a proceeding *in rem* against the vessel for damages from a collision caused by the fault of the pilot, and the decision stands upon a ground wholly independent of the personal liability of the owners. As the court says in that case: "The maritime law "as to the position and powers of the master and the responsibility "of the vessel is not derived from the civil law of master and serv- "ant, nor from the common law; it had its source in the commer- "cial usages and jurisprudence of the middle ages. * * * Ac- "cording to the admiralty law the collision impresses upon the "wrong-doing vessel a maritime lien; this the vessel carries with it
"into whose ever hands it may come. It is inchoate at the
30 "moment of the wrong, and must be perfected by subsequent "proceedings."

On the question of the liability of the vessel, the case of the China has been followed by the same court in the case of the Mer-

rimac, 14 Wall., 199, which was not, however, a case of compulsory pilotage like the case of the China.

The opinion in the case of Bussy *v.* Donaldson, 4 Dal., 206, by Shippen, C. J., shows that the point was taken before the court that the owner was not liable for the reason that the pilot was not the servant of the owner, but the officer of the State. The court says of this point: "The distinction is rather plausible than solid. The "legislative regulations were not intended to alter or obliterate the "principles of law by which the owner of a vessel was previously "responsible for the conduct of the pilot; but to secure in favor of "every person (strangers as well as residents) trading to our port, a "class of experienced, skilful and honest mariners to navigate their "vessels safe up the bay and river Delaware. The mere right of "choice indeed, is one but not the only reason why the law, in gen-"eral, makes the master liable for the acts of his servant; and in "many cases, where the responsibility is allowed to exist, the servant "may not, in fact, be the choice of the master. For instance, if the "captain of a merchant vessel dies on the voyage, the mate becomes "captain, and the owner is liable for his acts, though the owner did "not hire him originally nor expressly choose him to succeed the "captain. The reason is plain. He is in the actual service of the "owner, placed there, as it were, by the act of God; and so, in the "case under consideration, the pilot was in the actual service of the "owner of the ship, though placed in that service by the provident "act of the legislature. The general rule of law, then, entitles the
"plaintiff to recover; and we have heard of no authority,
31 "we can recollect none, that distinguishes the case of a pilot
"from those numerous cases on which the general rule is "founded."

Smith and Brackenridge, JJ., concurred.

The reasons given for the rule seem to depend more upon considerations of convenience than upon strict legal principle. If the effect of the legislative regulation was to take the ship out of the hands of her owner and put her in the hands of a public officer, there seems to be no principle of law under which the owner could be responsible for the negligence of such public officer, even if the legislative act did not express any intention to alter or obliterate what would otherwise have been the responsibility of the owner for the act of the pilot—that is, for the act of a pilot appointed by the owner. Of the many cases said to exist of responsibility for the act of another, though such other was not the choice or appointee of the person held liable, the illustration is not a fortunate one. In case of the death of the captain, the mate becomes captain with the consent and by the authority of the owner, and whether appointed by the owner himself or by the captain, he is appointed by the act of the owner or by his authority, and it is a part of his understood duty by the maritime law to take command of the vessel in case of the death of the captain. So the circumstance that the voyage is for the benefit of the owner, and that the pilot is in his actual service in the sense that he is working towards the completion of the

voyage upon which the ship is sent by the owner, the same argument would hold with reference to the passenger in the livery-stable carriage, and would impose a responsibility for the drover's servant upon the owner of the bullock, and indeed would impose responsibility upon the owner of a ship for the negligent act of the master or crew employed by the charterer.

The law is well settled that if the terms of the charter-party are such as to amount to a demise of the ship, putting her out
32 of the control and possession of the owners, and under the control and into the possession of the charterers, who appoint the master and crew, the owners are not responsible for the negligent acts of the master and crew, whether to persons contracting with the master, as shippers of cargo, or to outside parties, injured by negligent navigation, except, perhaps, as to the former, who may be ignorant of the terms of the charter-party, and who contract with the master, believing him to be the servant of the owners. The test of liability of the owner in such cases is, whether the master and crew were his servants or not. (Fenton *v.* City of Dublin Steam Packet Co., 8 Ad. & Ellis, 835. For a very full and careful statement of this doctrine, and the authorities, see Abbott on Shipping, 12th ed., pp. 57–70.)

And yet in all such cases the ship is liable for negligent navigation in the admiralty *in rem*. (The Ticonderoga, Swabey, 215; the Tasmania, 13 P. Div., 110; the Lewington, 2 Asp. M. L. Cas. (N. S.), 475.) And the only limitation of this liability *in rem* which these cases suggest, is that the liability of the ship *in rem* ceases where she is navigated, and the injury is done by some one not deriving his authority to navigate her from the owners; that is, if a ship is sent to sea without the owner's consent, or tortiously, she may not be bound *in rem*.

The analogy of the non-liability of the owners of a ship under charter, and therefore out of control of the owners, and navigated, not by their servants, but by the servants of other persons, certainly supports strongly the defense in this case.

Since the case of Bussy *v.* Donaldson the true ground and limit of the liability of the master or principal for the negligence of the servant or agent has been very carefully considered, both in England and in this country, and unless an exception is made with regard to a vessel, and the owners of vessels, the case of Bussy *v.* Donaldson is out of harmony with the law of master and servant and principal and agent as now held.

33 The argument of convenience with regard to the remedy is indeed made a reason for this exceptional liability in the case of Williamson *v.* Price, 4 Martin (N. C.), 399.

I think both in that case and in the case of Bussy *v.* Donaldson the court assumed that the pilotage was compulsory. The Louisiana case is decided largely upon the authority of Bussy *v.* Donaldson and the case of the Neptune (1 Dods., 467); which latter case was afterwards overruled.

The court refers to the case of Fletcher *v.* Braddick (5 B. & P., 182) as sustaining the rule. That was a case of a vessel chartered

by the defendant to the Government, and having on board a naval officer who had, in general, the command of the ship, but the master and crew were appointed by the owner. It seems, however, that that case is rather an authority against the liability in case of compulsory pilotage, because the damage being caused by fault of navigation, the owner was held liable, but the court intimated that if it had been caused by the fault of the naval officer he might not be liable.

The argument of convenience is thus stated by the supreme court of Louisiana: "It seems hard, on the one side, that, while "necessity and in many places the law, compel to place a vessel "under the absolute command of a pilot, his misconduct should "subject to damages the owner of the ship on whom he is, it may "be said, forced. But, on the other hand, pilots are very seldom "persons able to compensate the owner of a vessel run foul of. The "owner of a vessel by whom the damage is done, receiving the "benefit of the voyage, it has been judged he should indemnify "persons injured by his vessel while employed for his benefit."

This argument from convenience, as a reason for holding the owner liable, is stated by the court in the case of the China
34 thus: "The maxim of the civil law, *sic utere tuo ut nonlaedas* "*alienum*, may, however, be fitly applied in such cases as the "one before us. The remedy of the damaged vessel, if confined to "the culpable pilot, would frequently be a mere delusion. He "would often be unable to respond by payment, especially if the "amount recovered were large. Thus, where the injury was the "greatest, there would be the greatest danger of a failure of justice."

The same reason is stated by Parker, Ch. J., in the case of Yates v. Brown, 8 Pick., 22. But that was not a case of compulsory pilotage.

The argument from convenience or a desire to secure to the party injured a remedy against the person who can respond in damages—which it is assumed a pilot ordinarily cannot do—may have had its legitimate influence in establishing the rule of maritime law making the vessel liable for all torts committed by her, at least where she is navigated with the consent of or under authority derived from the owners. She goes from port to port, and if she were not herself held responsible in the maritime courts of the world for her torts, persons injured thereby would, for the most part, be remediless; and this may have been the reason for the rule making her liable—a rule of so great antiquity that the time and manner of its origin are lost in the past, but so wholesome that it stands undisturbed to this day wherever the maritime law is administered. It is not necessary to inquire whether the decision in the case of the China was a correct application of this principle according to the general maritime law. It must be assumed that that decision is at present the established law of our courts of admiralty so far as relates to the liability of the vessel *in rem*. But such an argument, from convenience, has no place in determining the question of a common-law liability of the owner which rests upon rules of law governing the responsibility of the master for the acts of the serv-

ant or the principal for the acts of the agent. That the
35 liability *in personam* of the owner does stand upon this principle in this country as well as in England appears by the case of Sturgis *v.* Boyer, 24 How., 123, in which it was held that a vessel employing a tug to move her from place to place is not liable for the fault or negligence of the master and crew of the tug who are employed by the owners of the tug. Mr. Justice Clifford there says: "Unless the owner and the person or persons in charge of the "vessel in some way sustain toward each other the relation of prin- "cipal and agent, the injured party cannot have his remedy against "the colliding vessel. By employing a tug to transport their vessel "from one point to another, the owners of the tow do not necessa- "rily constitute the master and crew of the tug their agents in per- "forming the service. They neither appoint the master of the tug "or ship the crew, nor can they displace either the one or the other. "Their contract for the service, even though it was negotiated with "the master, is, in legal contemplation, made with the owners of the "vessel, and the master of the tug, notwithstanding the contract "was negotiated with him, continues to be the agent of the owners "of his own vessel, and they are responsible for his acts in her "navigation."

In that case the court follows and approves the case of Sproul v. Hemmingway (14 Pick., 1), in which Ch. J. Shaw discusses the question at considerable length on the ground of liability of the owner of a vessel at common law for the negligence of the master and crew of a tug employed to tow her, and the liability was denied on the ground that the master and crew who were guilty of negligence were not the servants of the owner of the ship.

While the English courts have reached a different conclusion from the Supreme Court as to the liability of the tow and her owner for the negligence of those in charge of the tug, yet it is upon grounds which do not conflict with the principle of the liability of the master for the acts of a servant; that difference is carefully pointed out by Judge Lowell in the case of the Belknap, 2 Low., 281.

The English courts have taken a different view of the relation between the owner of the ship and those managing the tug;
36 the latter are held to be the servants of the former. The owner of the vessel is held responsible as a master for the acts of his servant under the doctrine of *respondeat superior*. (The Belknap, 2 Lowell, 281.)

It is not pertinent to the present inquiry whether in Sturgis v. Boyer, which was a suit *in rem*, it was rightfully assumed by the court that the vessel was not liable if the owners would not be liable *in personam*, or whether that case can be reconciled with the later case of the China, in respect to the liability of the vessel.

The case of the Creole (2 Wall., Jr., 485) was a libel *in rem* against the vessel in admiralty. So also was the case of the bark Lotty, Ole., 329.

The other American cases cited in support of the liability of the defendant are clearly distinguishable.

The case of the Julia M. Halleck (1 Sprague, 539) does not appear to be a case of compulsory pilotage.

The Massachusetts pilot law, while requiring a vessel refusing a pilot to pay pilotage fees, is not regarded as making pilotage compulsory.

The Carolus, 2 Curtis, 68.
The Marcellus, 1 Clif., 481.

The case of Snell *v.* Rich (1 John., 305) involved the question of the liability of the master while a pilot was on board. As stated in the case of the China, the liability of the master does not depend upon the rules of the common law, but the rules and usages of the maritime law.

It is evident, from the opinion of Mr. Justice Curtis, in the case of the Carolus, *ut supra*, that if the pilotage had been compulsory he would have held the owner not liable, and although this dictum is disapproved by Mr. Justice Clifford in the case of the Marcellus (1 Clif., 492), it would seem to be well founded both on reason and authority.

The case of Yates *v.* Brown, *ut supra*, indeed, states the general proposition that the owners of a vessel which, by collision with another vessel, has caused damage through the fault or negli-
37 gence of any one on board, is answerable to the injured party in respect of their property, notwithstanding there may be a pilot on board who has entire control and management of the vessel. It is put upon the ground of convenience. It is doubtful if in that case the pilotage was understood by the court to be compulsory.

In the other Massachusetts cases the pilotage has been held not compulsory. Of course, if the owner accepts a pilot not by compulsion of law, but voluntarily, no distinction can be made between the negligent acts of such a pilot and a master appointed by the owner; but it appears to be true of the case last cited, as of many others in which the doctrine of a more convenient and satisfactory remedy for the injured party is urged, that the court adopted and applied to the question of the liability of the owner, consciously or unconsciously, the principle of the maritime law which imposes a liability upon the vessel, which principle is not strictly or properly applicable where the case has to be determined purely upon the principles of the common law. The liability of the owner *in personam* by the maritime law has been said to be the same as at common law. The Germania, 9 Ben., 356. And I find no cases inconsistent with this dictum. It is certainly most unjust to give a remedy against a party who is not legally responsible, because the injured party may have an inadequate remedy against the party who is legally liable. And with the utmost respect for the courts which have put the liability of the owners on the argument of convenience, I am unable to follow them, or to attribute to this circumstance the effect of making a distinction between vessels and other chattels as respects the liability of the owners for negligence in their use. I think the common law makes no such distinction.

The case of Denison *v.* Seymour (9 Wend., 1) was the case of a vessel in charge of a pilot appointed by the owners, and the question before the court related to the liability of the master in such case. It has no bearing upon the question involved in the present case.

While, therefore, it must be admitted that there is some
38 authority, and many dicta in favor of holding the owner of a vessel liable for the negligence of a pilot compulsorily imposed upon the vessel, I have come to the conclusion that, both upon reason and authority, the rule is otherwise, and that, therefore, the defendant in this case is entitled to judgment.

The objection that this pier was the property of the city, and that the city is but a part of the government of the State, and that it was the agent of the State whose negligent act caused the injury, has no merit as a ground for refusing relief in damages. The argument seems to be that the property destroyed was not the property of the plaintiff, but the property of the State. The action, however, is for the injury to the private and individual interest of the plaintiff in this property, the fee of which belongs to the public. By obtaining a lease from the city, the plaintiff acquired an interest, which is entirely independent of the property of the State, and by the terms of the lease the plaintiff was under obligation to repair the pier, and both upon the ground of this obligation, whereby the plaintiff has been injured, and also upon the ground of the plaintiff's special interest in the pier, which is quite independent of that of the State or the city, which special interest has been damaged by the act of the pilot, it would be no obstacle in my opinion to the plaintiff's recovering the damage, if otherwise entitled, that the ... in the land is vested in the city as one of the departments of the State government.

So also the defence set up in the answer that the Harter act, so called (27 St. Ch., 105, p. 445), relieves vessels from all liability for the negligent act of the master and crew, if the vessel is properly manned and equipped for the voyage, cannot be sustained. That act is limited to the regulation of the liability of the vessel, her owners and master to the shipper and has no application to torts committed against other persons, or their property, nor do its
39 provisions seem to be retroactive. This tort was committed before the passage of the act.

The amount of the damages may, however, be properly determined upon this reference in order that judgment for the proper amount may be finally entered, if the court should hold the plaintiff entitled to recover.

It is proved, that the cost of repairing the plaintiff's pier was $13,153.34. Of this amount $5,460 was paid by the plaintiff on the 15th February, 1893, and the balance on the 15th March, 1893; and interest is to be allowed on those payments from the said dates respectively.

It is also proved that the plaintiff lost the opportunity to rent out a part of the pier in consequence of the damage, for a period of three months. There was a demand for such property, and the plaintiff could have obtained for it, during the period it was thus

deprived of its use, $2,250; and I think the plaintiff would be entitled to recover this sum, in addition to its actual expenses, with interest from the 15th day of March, 1893, if it were entitled to a judgment.

But for the reason given above the defendant is entitled to judgment with costs.

N. Y., May 28th, 1894.

WM. G. CHOATE.

Case settled as printed and ordered on file.

February 25, 1896.

WM. G. CHOATE, *Referee.*

40 U. S. Circuit Court, Southern District of New York.

THE HOMER RAMSDELL TRANSPORTATION COMPANY, Plaintiff,
against
LA COMPAGNIE GENERALE TRANSATLANTIQUE, Defendant.

This action having been referred by an order entered herein on the 16th day of October, 1893, to William G. Choate, Esq., to hear and determine all the issues herein, and after trial had on due notice to all parties, the said referee having on the 14th day of
41 June, 1894, duly made and filed his report herein, stating his findings of fact and conclusion of law thereon, and directing judgment dismissing the *the* complaint herein upon the merits, with costs to the defendant to be taxed, and the plaintiff having filed exceptions to the referee's report and an order having been made overruling the same and confirming said report, and the defendant's costs having been duly adjusted at the sum of seven hundred and twenty-nine and $\frac{65}{100}$ dollars ($729.65);

Now, on motion of Jones & Govin, attorneys for the defendant, it is

Ordered, that the plaintiff's complaint be and the same is hereby dismissed, and that the defendant recover of the plaintiff the sum of seven hundred and twenty-nine and $\frac{65}{100}$ dollars costs of this action.

Judgment signed this 14th day of April, A. D. 1898.

(S'd) JOHN A. SHIELDS, *Clerk.*

(Endorsed:) Circuit court of the United States for the southern district of New York. The Homer Ramsdell Transportation Co. *vs.* La Compagnie Generale Transatlantique. Judgment-roll. U. S. circuit court. Filed Apr. 14, 1898, 2.09 p. m. John A. Shields, clerk.

42 UNITED STATES OF AMERICA, *Second Circuit,* } *ss.*:

I, William Parkin, clerk of the United States circuit court of appeals for the second circuit—

Do hereby certify that the foregoing certificate in the case entitled

Homer Ramsdell Transportation Company against La Compagnie Generale Transatlantique was duly filed and entered of record in my office by order of said court on the 6th day of December, 1899, and, as directed by said court, the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

Seal United States Circuit Court of Appeals, Second Circuit.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said United States circuit court of appeals for the second circuit, at the city of New York, in the southern district of New York, in the State of New York, this 7th day of December, in the year of our Lord one thousand eight hundred and ninety-nine.

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

43 [Endorsed:] U. S. circuit court of appeals, 2nd circuit. Homer Ramsdell Transportation Co. *vs.* La Compagnie Generale Transatlantique. Proposed certificate to Supreme Court, with notice of settlement. Jones & Govin, att'ys for def't in error, 45 Cedar street, New York. Service of a copy of the within-proposed certificate & notice of settlement admitted this 23rd day of November, 1899. E. L. Fancher, att'ys for pl'ff in error. United States circuit court of appeals, second circuit. Filed Dec. 6, 1899. William Parkin, clerk.

[Endorsed:] 23.80. United States circuit court of appeals, second circuit. Homer Ramsdell *v.* La Compagnie Generale Transatlantique. Certificate.

Endorsed on cover: File No., 17,584. U. S. C. C. of appeals, 2nd circuit. Term No., 166. The Homer Ramsdell Transportation Company, plaintiff in error, *vs.* La Compagnie Generale Transatlantique. (Certificate.) Filed December 14th, 1899.

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 166.

THE HOMER RAMSDELL TRANSPORTATION COMPANY,
Plaintiff in Error,

vs.

LA COMPAGNIE GENERALE TRANSATLANTIQUE.

ARGUMENT FOR PLAINTIFF IN ERROR.

Statement of the Case.

The case comes to this Court on a certificate from the United States Circuit Court of Appeals for the Second Circuit.

The action was brought originally in the Supreme Court of the State of New York and removed to the United States Circuit Court for the Southern District of New York. On consent of the parties it was referred to the Hon. William G. Choate to hear and determine the issues, pursuant to the rule of the Circuit Court, which is as follows :

"FEBRUARY 5TH, 1877.

"In actions at law a consent to a reference of the whole issue must likewise contain a provision that judgment shall not be entered until after ten

days' notice of the filing of the report of the Referee, and of the judgment proposed to be entered thereon. After a reference, at any time before the entry of judgment, either party may move for a new trial upon a case or exceptions, and, if such motion be denied, the decision of the motion and the questions involved in it may be entered on the record as if it had been a ruling made upon a trial by the Judge without a jury, and excepted to in like manner. When a motion for a new trial is intended to be made the Court may extend the time for entering judgment upon the application of the moving party, and may stay all other proceedings until the decision of the motion."

The case was tried before the Referee, who made his report in writing (fols. 16-21), and plaintiff's exceptions having been overruled and the report confirmed, judgment was entered against plaintiff dismissing the complaint with costs (fols. 40, 41). On writ of error to the Circuit Court the case was taken to the Circuit Court of Appeals for the Second Circuit, and two questions are certified to this Court under the provisions of Section 6 of the Act of March 3, 1891, establishing Circuit Courts of Appeal.

The action was brought to recover for damages to plaintiff's pier by the steamer *La Bretagne*, which collided with the pier on her outward voyage. The facts are sufficiently stated in the certificate from the United States Circuit Court of Appeals—the other findings of the Referee covering matters not in discussion before this Court. The statement of facts is as follows (fols. 2, 3):

"The defendant in error is a foreign corporation, owning and plying a regular line of steamers between Havre and New York. On the morning of December 10th, 1892, one of the defendant's

steamers, *La Bretagne*, while outward bound from the port of New York to Havre, by way of Sandy Hook, with cargo and passengers, struck the plaintiff's pier, damaging it to the amount of upwards of thirteen thousand (13,000) dollars. The said vessel at the time she left her pier was in all respects seaworthy and properly manned, equipped and supplied, and her owner exercised due diligence to make her so. She had on board a Sandy Hook pilot, duly licensed under and pursuant to the laws of the State of New York, and was navigated under his direction up to the time of said collision, and all his orders were promptly and efficiently obeyed and carried out by the master, officers and crew of said steamship. The said collision and the damage resulting therefrom were caused solely by the negligence and want of skill and care on the part of the said pilot, and not by any want of skill or negligence on the part of the master, other officers or crew of the said steamship."

The questions certified are as follows (fols. 3, 4):

First. Whether the provisions of Chapter 467 of ths laws of New York passed June 28, 1853, as amended by Chapter 196 of the laws of said State passed April 11, 1854; Chapter 243 of the laws of the said State passed April 3d, 1857; Chapter 930 of the laws of the said State passed May 16, 1867, and Chapter 548 of the laws of said State passed May 2, 1870, and consolidated into Sections 2093 to 2123, inclusive, of Chapter 410 of the laws of said State passed July 1, 1882, impose compulsory pilotage on foreign vessels inward and outward bound to and from the port of New York by way of Sandy Hook, in view of the decisions of the New York Court of Appeals.

Second. Whether in an action at common law the shipowner is liable for injuries inflicted exclusively by

negligence of a pilot accepted by a vessel compulsorily.

The only sections of the pilotage laws referred to, which affect the questions under discussion are Sections 2100, 2119 and 2120, as follows:

> "SEC. 2100. The said commissioners shall have the power to regulate the stationing of pilot boats for the purpose of receiving pilots from outward-bound vessels, may alter or amend any existing regulations of pilots, and make and duly promulgate and enforce new rules or regulations, not inconsistent with the laws of this state, or of the United States, which shall be binding and effectual upon all pilots licensed by them, and upon all parties employing such pilots. They may declare and enforce forfeitures of pilotage upon any mismanagement or neglect of duty by the pilots licensed by them; they may declare and impose and collect fines and penalties not exceeding Two hundred and fifty dollars for each offense, *to prevent any of the pilots licensed by them from combining injuriously with each other, or with other persons*, and to prevent any person licensed by them from acting as a pilot during his suspension, or after his license may be revoked; and the said commissioners may establish and enforce all other needful rules and regulations for the conduct and government of the pilots licensed by them, and the parties employing them; and they may enforce and receive accounts of all moneys collected for pilotage by the pilots licensed by them, and may impose and collect from such pilot a sum not exceeding three per cent. on the amount thereof, to defray their necessary expenses, including clerk hire and office rent. *Any pilot bringing in a vessel from sea shall, by himself or one of his boat's company, be entitled to pilot her to sea when she next leaves the port, unless, in the mean-*

time, a complaint for misconduct or incapacity shall have been made against such pilot or one of his boat's company, and proved before the Board of Commissioners of pilots; provided, however, that if the owner of any vessel shall desire to change such pilot, then the said commissioners may assign any other pilot on the same pilot boat to pilot said vessel to sea."

"SEC. 2119. * * * All masters of foreign vessels and vessels from a foreign port, and all vessels sailing under register, bound to or from the port of New York by the way of Sandy Hook, shall take a licensed pilot, or in case of refusal to take such pilot, shall himself, owners or consignees, pay the said pilotage as if one had been employed; and such pilotage shall be paid to the pilot first speaking or offering his services as pilot to such vessel. Any person not holding a license as pilot under this title, or under the laws of the State of New Jersey, who shall pilot, or offer to pilot, any ship or vessel to or from the port of New York by the way of Sandy Hook, except such as are exempt by virtue of this title, or any master or person on board a steamtug or towboat, who shall tow such vessel or vessels, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by a fine not exceeding one hundred dollars or imprisonment not exceeding sixty days; and all persons employing a person to act of pilot, not holding a license under this title, or under the laws of the State of New Jersey, shall forfeit and pay to the board of commissioners of pilots the sum of one hundred dollars."

"SEC. 2120. Any person not holding a license as pilot under this title, or under the laws of the State of New Jersey, who shall pilot or offer to pilot any ship or vessel, not embraced in the preceding section, to or from the port of New York, by the way of Sandy Hook, shall be deemed

guilty of a misdemeanor, and, on conviction, shall be punished by a fine not exceeding one hundred dollars or imprisonment not exceeding sixty days; and all persons employing a person to act as pilot not holding a license under this title, or under the laws of the State of New Jersey, shall forfeit and pay to the Board of Commissioners of Pilots the sum of one hundred dollars."

FIRST POINT.

The pilotage law applicable to New York harbor is not compulsory. For the outward voyage, at all events, there is no compulsory pilotage; no law interferes with the free choice by the master of any pilot licensed either under the laws of New York or those of New Jersey.

In defining compulsory pilotage there has been some diversity of opinion, but both the English Courts and this Court have agreed that statutes or rulings exempting owners from liability for the acts of pilots should be strictly construed. The definition was discussed by this Court in the following cases:

The China, 7 Wall. (174 U. S.), 53.
The Merrimac, 14 Wall. (81 U. S.), 199.
Sherlock vs. Alling, 3 Otto (93 U. S.), 99.

In the case of *The China*, the majority of the Court agreed in the opinion of Mr. Justice SWAYNE that, where the master was liable to pay pilotage in case of refusal to take a pilot, pilotage was compulsory. It was there assumed that the New York Pilot Law required the employment of the *pilot first offering his*

services. From this view Mr. Justice CLIFFORD and Mr. Justice FIELD dissented.

In the later case of the *Merrimac*, the following language was used by Mr. Justice CLIFFORD in an opinion which was concurred in by the whole Court :

> " State pilot laws, which compel the owners of vessels to pay half pilotage in cases where the pilot offers his services and they are refused—where the law is not enforced by any penalty—are not regarded as compulsory, and, therefore, the fact that the vessel was in charge of a pilot under such a law at the time of the collision is no defense to a libel for damages, if it appears that the collision was occasioned by negligence or unskillful navigation *(The Marcellus, 1 Cliff., 490).* Port regulations are supposed to be known to the shipowner before he sends his vessel on the voyage, and the general rule is that in sending her to any particular port he elects to submit to the lawful regulations established at that port, and that the vessel, in case she unlawfully collides with another vessel engaged in lawful commerce, shall be responsible *(The Carolus, 2 Curt. 69).* Where the law is not enforced by any penalty it is not regarded as compulsory, and, if not compulsory, the defense that the ship was in charge of a pilot is not a valid defense, which is all that need be said upon the subject *(Martin vs. Hilton, 9 Met., 371 ; Hunt vs. Carlisle, 1 Gray, 257).*"

In the case of *Sherlock vs. Alling*, more fully referred to hereafter, the rule is adopted that, where the master has the selection from among a class of licensed pilots, the law requiring the employment is not compulsory pilotage.

This rule is thus stated by the learned Referee in his opinion (fol. 27) :

"If the shipowner were at liberty to select a pilot out of a class of pilots licensed by the State, it could not be held that the shipowner was compelled to take the particular pilot employed."

The learned Referee has construed the effect of the New York pilot law in the following words (fols. 26, 27):

"There is no doubt in this case that the law of New York compels the ship to employ a pilot appointed by the State.

"By the New York Pilot law a foreign ship, when inward bound, *is obliged to take the first pilot that offers his services.* While the masters of certain vessels may be licensed to pilot their own vessels, it is provided in the statute that all vessels from foreign ports shall take a licensed pilot, or, in case of refusal, pay full pilotage; and it is further provided that any person not holding a license who pilots a vessel in or out of the harbor of New York shall be held guilty of a misdemeanor, and any one employing a person not holding a license to pilot a vessel shall forfeit and pay the sum of $100.

"The provision with regard to outward pilotage is that the pilot who brought in the ship has the right by himself or one of his boat's company to take her out unless he has been complained of for misconduct; subject, however, to the right of the shipowner to object to this particular pilot, in which case the commissioners of pilots shall assign another pilot from the same boat's company to take the ship out."

3 Rev. Stat. (7th Ed.), pp. 2017, 2019, 2020.

"If the shipowner were at liberty to select a pilot out of a class of pilots licensed by the State, it could not be held that the shipowner was compelled to take the particular pilot employed. But

the right to object to one particular pilot certainly does not make the appointment of another selected by the commissioners from the same boat's crew a voluntary appointment by the owner of the vessel of such substituted pilot.

"In the case of *The China*, 7 Wall., 53, the majority of the court held that the New York statutes created a system of compulsory pilotage. Both the master and the owner are subjected to penalties besides their liability to pay full pilotage in case of their refusal, and as to the master such refusal is expressly made a misdemeanor. It seems to me there can be no question that the pilotage is compulsory."

I have been unable to find any provision of law expressly making it a misdemeanor for the master to refuse to take a pilot. It is a misdemeanor for a master of a tug to tow a vessel without having a pilot's license, and it is also a misdemeanor for a person not holding a license to act or offer to act as a pilot. It is not, however, made a misdemeanor for a master to pilot his own vessel without having such license. It is provided by Section 2119 that the master refusing to take a pilot shall pay the pilotage as if one had been employed, and that all persons employing a person to act as pilot not holding a license under this title or under the laws of the State of New Jersey, shall forfeit and pay to the Commissioners the sum of one hundred dollars. It is only one who pilots, or offers to pilot or tows a ship, who shall be guilty of a misdemeanor.

The statute expressly enumerates the cases in which a master is liable, but does not include piloting his own vessel. It is evident that a master is not intended to be included in the general description of one "who pilots or offers to pilot a ship." Such a reading would violate the rule for strict construction of penal statutes.

So far as the New York statute imposes a penalty for violation of its provisions, it is construed strictly. *Sturgis vs. Spofford*, 45 N. Y., 446.

This view was apparently urged on the attention of the Court in the case of the *China*, but was not passed upon, as it was not deemed necessary for the decision of the case, the Court apparently assuming like the learned Referee, that it was obligatory to take the *first pilot who offered his services.*

> "It was contended by the counsel for the appellee that if the master had chosen to proceed without a pilot he would have been liable only to the payment of pilotage; and that none of the other penal provisions of the statute, according to its true meaning applied in such a case. We have not found it necessary to examine this subject. Giving to the statute either construction, it seems to us clear, in the light of both reason and authority, that the pilot was taken by the steamship upon compulsion" *(The China, supra).*

The less drastic construction referred to in these words is the liability to pay the first pilot who offered his services the amount of his pilotage in case of refusal to accept *his* services, thus depriving the master or owner of the freedom of choice, which is one of the elements in determining the relation of principal and agent.

Since the decision of this Court in the case of *The China*, the New York pilot law has been examined by the Court of Appeals of the State, and that Court has given a construction to it different from that of the learned Referee, and differing from that of this Court, in so far as the latter assumed that the law required the employment of the first pilot under penalty of paying pilotage fees to him, thus giving the master no right of selection from the class.

In the construction of statutes of a State this Court will follow the decisions of the highest Court of the State, and will "only form an independant judgment as to the meaning of the state law where there was no binding construction of such state statute by the court of last resort of the state."

Sioux City Term. R. R. & Warehouse Co. vs. Trust Co. of No. Amer., 173 U. S., 99.
Missouri, Kans. & Tex. Ry. Co. vs. McCann, 174 U. S., 580.

"If there be any inconsistency in the opinions of these courts, the general rule is that we follow the latest settled adjudications in preference to the earlier ones." Even where this Court has followed the construction of the State statute given by the highest Court of that State, and such earlier construction has been overruled by the State Court, this Court will follow "the later case, although it had previously adopted the rule laid down in the overruled cases."

Wade vs. Travis Co., 174 U. S., 499, 508.

The case of *The China* was decided in 1868, and in 1875 the statute was construed by the New York Court of Appeals, in *Brown vs. Elwell*, 60 N. Y., p. 249, and *Gillespie vs. Zittlosen*, 60 N. Y., p. 449.

In *Brown vs. Elwell* it was held that the Act of Congress of March 2, 1837, providing that the master of any vessel coming into or going out of any port situate upon waters which are the boundary between any two States may employ any pilot licensed or authorized by the law of either, must be read in connection with the New York pilot law, so that in all cases in the latter statute where the words "licensed pilot" are employed they must be held to mean a pilot licensed either under the laws of New Jersey or those of New York. The present statute follows this decision in its provisions.

Gillespie vs. Zittlosen was an action brought by a pilot who first spoke and offered his services to the

master of a brig sailing from a foreign port to the port of New York. The master refused to accept his services as pilot, but subsequently took another licensed pilot who piloted the brig into port. In the opinion written by Chief Justice CHURCH it is said:

> "The penalty or liability is imposed for not taking any pilot. It is only when no pilot is taken that pilotage must be paid as if one had been employed, and in that case only; that is when no pilot is taken the pilotage must be paid to the pilot first speaking.
>
> "There is no provision requiring a vessel to take the first pilot or to pay pilotage to him if he is not taken. If the pilotage, in case of refusal or neglect to take any pilot, had been payable to the commissioners of pilots, no question could have been raised; but the condition of liability is not affected by requiring it to be paid to the first pilot speaking. No other construction can properly be given to the language of this Act and we have no alternative but to give it effect. * * *
>
> "The right of recovery by the first pilot in case of refusal to take any pilot, together with the chance of being employed, is an inducement to be vigilant, and it may have been deemed proper *to give the vessel some discretion in the selection of pilots* as well as the place where one should be taken.
>
> "I am unable to see that the provisions of the Act are unwise or unjust. If it was designed to compel a vessel to take the first pilot, the Legislature would have said so. Courts have no right to change the plain terms of a statute."
>
> *Gillespie vs. Zittlosen*, 60 N. Y., p. 449.

There is even greater liberty in the choice of a pilot for an outgoing vessel. Of an incoming vessel it may be said that the refusal of the first pilot offering his

services might occasion delay, and the master would incur the risk of not meeting any pilot and of encountering bad weather while waiting for one. While this would be equally true in all cases where the selection from a class of pilots was left wholly to the master, even these considerations would not affect the choice of a pilot for the outward voyage.

The learned Referee was of the opinion that this freedom of choice was abridged by Section 2100. We have already seen, however, that it is authoritatively decided that the Pilot Law will be strictly construed, and that a direction in a statute not enforced by penalty does not constitute compulsory pilotage. There being no penalty expressly provided for the violation of this direction (that the "pilot bringing a vessel from sea shall * * * be entitled to pilot her to sea when she next leaves the port"), the refusal to employ would be punished only under § 2119, which, as has been shown, does not interfere with the freedom of choice.

A closer examination of the particular section will, I think, make it clear that it was not intended to interfere with the choice of pilots by a master, but was a wholesome regulation of the conduct of pilots among themselves. It was to prevent them from combining to obtain employment, and, possibly, to relieve masters from importunity and annoyance. The section referred to is entirely taken up with the government and control of pilots by the Commissioners, and is not intended to define their rights or duties in relation to the employers. The section is here reprinted:

> "SEC. 2100. The said Commissioners shall have the power to regulate the stationing of pilot boats for the purpose of receiving pilots from outward-bound vessels, may alter or amend any existing regulations of pilots, and make and duly promulgate and enforce new rules or regulations, not inconsistent with the laws of this state, or of the

United States, which shall be binding and effectual upon all pilots licensed by them, and upon all parties employing such pilots. They may declare and enforce forfeitures of pilotage upon any mismanagement or neglect of duty by the pilots licensed by them ; they may declare and impose and collect fines and penalties not exceeding Two hundred and fifty dollars for each offence, *to prevent any of the pilots licensed by them from combining injuriously with each other, or with other persons,* and to prevent any person licensed by them from acting as a pilot during his suspension, or after his license may be revoked; and the said commissioners may establish and enforce all other needful rules and regulations for the conduct and government of the pilots licensed by them, and the parties employing them ; and they may enforce and receive accounts of all moneys collected for pilotage by the pilots licensed by them, and may impose and collect from such pilot a sum not exceeding three per cent. on the amount thereof, to defray their necessary expenses, including clerk hire and office rent. *Any pilot bringing in a vessel from sea shall, by himself or one of his boat's company, be entitled to pilot her to sea when she next leaves the port,* unless, in the meantime, a complaint for misconduct or incapacity shall have been against such pilot or one of his boat's company, and proved before the Board of Commissioners of pilots; provided, however, that if the owner of any vessel shall desire to change such pilot, then the said commissioners may assign any other pilot on the same pilot boat to pilot said vessel to sea."

It is respectfully submitted, therefore, that the pilot law of New York is not compulsory, for it does not interfere with the selection by the master of any pilot from among those licensed by either New York or New

Jersey; and in regard to the outward voyage there is no penalty for employing a different pilot from the one who brought the vessel in, the provision of the law in that respect being only "to prevent any of the pilots licensed by them from combining injuriously with each other or with other persons."

SECOND POINT.

A licensed pilot, even where pilotage is compulsory, is the servant of the owner, and the owner is liable for the pilot's negligence. This liability may be enforced as well by action at common law in personam as in admiralty in rem.

The learned Referee concedes that the law is well settled that in Admiralty *in rem*, the vessel is liable for the negligent acts of a pilot compulsorily employed. Indeed, since the case of *The China*, where the law was most carefully examined and applied to the pilotage laws of New York, the question has been considered no longer open to discussion. The Court was unanimous in this conclusion, although Justices CLIFFORD and FIELD expressed the opinion that a provision compelling payment of pilotage fees, where a pilot was refused, did not make the statute one of compulsory pilotage.

Pilotboat Washington vs. Saluda, U. S. Dist. Ct., S. C., April, 1831.
Story on Bailments, Secs. 399, 400.
The China, 7 Wallace (74 U. S.), Rep. p. 53.
Atlee vs. Norn. Packet Co., 21 Wallace (88 U. S.), p. 389.
The Neptune, 1 Dodson R., 467.
The Merrimac, 14 Wallace, (81 U. S.), 199.
Sherlock vs. Alling, 3 Otto (93 U. S.), 99.
The E. M. Norton, 15 Fed. Rep., 686.

The learned Referee also concedes that the action is properly brought at common law and that a suit in admiralty would not lie, and cites authority for such opinion (fol. 27).

He also accepts the dictum (fol. 37) that the liability of the owner *in personam* by the maritime law is the same as at common law.

Conceding all this however, the learned Referee proceeds (fol. 38):

> "While, therefore, it must be admitted that there is some authority, and many *dicta* in favor of holding the owner of a vessel liable for the negligence of a pilot compulsorily imposed upon the vessel, I have come to the conclusion that, both upon reason and authority, the rule is otherwise, and that, therefore, the defendant in this case is entitled to judgment."

The same cases cited by the learned Referee were examined by this Court in *The China;* the same reasons were ably argued and pressed upon the attention of this Court; the whole matter has been reexamined and the conclusions reaffirmed by this Court, and yet he says that, "with the utmost respect for the Courts" reaching that conclusion, he is "unable to follow them."

It was strenuously urged both before the Referee and the Circuit Court of Appeals that there was a distinction between the maritime law as applied in courts of Admiralty and the common law as applied in other courts; and the learned Referee, while conceding that the law is settled in the former forum, bases his conclusion in the present case on such distinction.

When the law was first examined by this Court the argument seems to have been urged that courts of Admiralty would not follow common-law precedents in sustaining the liability of the owner for the pilot's acts. On this point Mr. Justice SWAYNE said:

"The immunity of the wrongdoing vessel when the pilot is in charge, and alone in fault, is now well settled in English jurisprudence, both in the Admiralty Court and in the courts of common law. *The rule must necessarily be the same in both.* In such cases the liability of the ship and of the owner are convertible terms. *The ship is not liable if the owners are not ;* and no responsibility can attach to the owners if the ship is not liable to be proceeded against (*The Druid*, 1 Wm. Rob., 399)."

The *China*, *supra*.

In the case of the *Druid* Dr. LUSHINGTON expresses the rule in the following words :

"In all causes of action which may arise from circumstances occuring *during the ownership of the person whose ship is proceeded against* I apprehend that no suit could ever be maintained against a ship where the owners were not themselves personally liable, or where their personal liability had not been given up, as in bottomry bonds, by taking a lien on the vessel. The liability of the ship and the responsibility of the owners, in such cases, are convertible terms. The ship is not liable if the owners are not responsible, and *vice versa*, no responsibility can attach upon the owners if the ship is exempt and not liable to be proceeded against " (p. 399).

In the court below it was said by counsel that this rule had been modified in the case of the *Bold Buccleugh*, 3 Wm. Rob., 220. This was an opinion also by Dr. LUSHINGTON, in which he expressly affirmed the doctrine of the *Druid* case so far as it applies to the matter now under discussion, the only question being whether the ship in the hands of subsequent owners would remain liable. I have been unable to find any

authority questioning the rule that the liability of the ship and that of the owners at the time of the accident are convertible terms.

Lord SELWYN has thus expressed the rule in the case of the *Halley*, Law Rep., 2 P. C. App., p. 193 :

> " It is admitted that the question must be decided upon the same principles as would be applicable to an action for damages for the collision in question if commenced in the Court of Queen's Bench or Common Pleas. * * *
>
> " In cases like the present, when damages are claimed for tortious collisions, a chattel, such as a ship or carriage, may be, and frequently is, figuratively spoken of as the wrongdoer, but it is obvious that, although redress may sometimes be obtained by means of the seizure and sale of the ship or carriage, the chattel itself is only the instrument by the improper use of which the injury is inflicted by the real wrongdoer " (at p. 202).

The leading case in Admiralty in this Court, *The China*, was decided on the authority of common law cases, and the reasoning in both classes of cases is the same.

Yates vs. Brown, 8 Pick., 23.
Bussy vs. Donaldson, 4 Dall. R., 206.
Fletcher vs. Braddick, 5 Bos. and Pull., 182.
Williamson vs. Price, 15 Martin (Lous.), 399.
Dennison vs. Seymour, 9 Wend., 8, 15.
The Eliza vs. The Decatur, *2 Whart. Dig.. p. 685, Sec. 524 :* (This case is there reported as decided in the U. S. D. C., 1825, Ms.).

In discussing the effect of compulsory pilotage Mr. Justice SWAYNE quotes with approval the following language from *Bussy vs. Donaldson :*

" The legislative regulations were not intended to alter or obliterate the principles of law by which the

owner of a vessel was previously responsible for the conduct of the pilot, but to secure in favor of every person—strangers as well as residents—trading to our port, a class of experienced, skillful and honest mariners to navigate their vessels safely up the Bay and the River Delaware. *The mere right of choice is indeed one, but not the only, reason why the law in general makes the master responsible for the acts of his servant,* and in many cases where the responsibility is allowed to exist the servant may not, in fact, be the choice of the master." Citing with approval *Williamson vs. Price, Yates vs. Brown* and *Dennison vs. Seymour*, referred to above.

The opinion of Mr. Justice SWAYNE proceeds as follows:

> " In the case of *The Creole*, decided by Mr. Justice GRIER on the circuit in the year 1853, 2 Wall., Jr., 485, the subject underwent a learned and thorough examination, both by counsel and the Court. The result was the same as in *Bussy vs. Donaldson*. It appears by that case that Mr. Justice WAYNE had ruled the point in the same way in his circuit. No American adjudication to the contrary has been brought to our attention.
>
> " The question is now, for the first time, presented in this Court.
>
> " The New York statute creates a system of pilotage regulations. It does not attempt, in terms, to give immunity to a wrongdoing vessel. Such a provision in a State law would present an important question, which, in this case, it is not necessary to consider.
>
> " The argument for the appellants proceeds upon the general legal principle that one shall not be liable for the tort of another imposed upon him by the law, and who is, therefore, not his servant or agent (15 East, 189; 4 M. & S., 77; 6 B. & C., 657; *Milligan v. Wedge*, 12 Adol. & Ell., 737; *Reedie v. Railway Company*, 4 Exch., 244).

" The reasoning by which the application of this principle to the case before us is attempted to be maintained is specious rather than solid. It is necessary that both outward and inward bound vessels, of the classes designated in the statute, should have pilots possessing full knowledge of the pilot grounds over which they are to be conducted. The statute seeks to supply this want, and to prevent, as far as possible, the evils likely to follow from ignorance or mistake as to the qualifications of those to be employed, by providing a body of trained and skillful seamen, at all times ready for the service, holding out to them sufficient inducements to prepare themselves for the discharge of their duties, and to pursue a business attended with so much of peril and hardship. The services of the pilot are as much for the benefit of the vessel and cargo as those of the captain and crew. His compensation comes from the same source as theirs. Like them he serves the owner and is paid by the owner. If there be any default on his part, the owner has the same remedies against him as against other delinquents on board. The difference between his relations and those of the master is one rather of form than substance. It is the duty of a master to interfere in cases of the pilot's intoxication or manifest incapacity, in cases of danger which he does not forsee, and in all cases of great necessity (*The Argo* 1 Swab., 464; *The Christiana*, 7 Moore, P. C., 172). The master has the same power to displace the pilot that he has to remove any subardinate officer of the vessel. He may exercise it or not, according to his discretion. * * *

" The maxim of the civil law—*sic utere tuo ut alienum non lædas*—may, however, be fitly applied in such cases as the one before us. The remedy of the damaged vessel, if confined to the culpable pilot, would frequently be a mere delusion. He

would often be unable to respond by payment—especially if the amount recovered were large. Thus, where the injury was the greatest, there would be the greatest danger of a failure of justice. * * * All port regulations are compulsory. The provisions of the Statute of New York are a part of the series within that category. A damaging vessel is no more excused because she was compelled to obey one than another. The only question in all such cases is, was she in fault? The appellants were bound to know the law. They cannot plead ignorance. The law of the place makes them liable. This ship was brought voluntarily within the sphere of its operation and they cannot complain because it throws the loss upon them rather than upon the owners of the innocent vessel. We think the rule which works this result is a wise and salutary one, and we feel no disposition to disturb it.

"The steamship is a foreign vessel. We have, therefore, considered the learned and able argument of the counsel for the appellants with more care than we should otherwise have deemed necessary. Maritime jurisprudence is a part of the law of nations. We have been impressed with the importance of its right administration in this case."

The China, 7 Wall. (74 U. S.), 53.

It was said by counsel, on the argument in the Court below, that this Court placed great stress on the judgment of Sir ROBERT PHILLIMORE, in the case of the *Halley*, and adopted his reasoning against the other cases cited, but that the case of the *Halley* was afterwards reversed in the Privy Council. The appeal was decided in 1868, and I have quoted some extracts from the opinion of Lord SELWYN on the appeal. The Privy Council expressly approves of the statement of the English law made by Dr. Lushington, but reverses the

judgment, holding that the English Courts would not enforce the liability of the ship owner imposed by the Belgian law, but would apply the *lex fori*. The reversal of that case did not make any change in the law of England, and it was the workings of the law there affirmed of which it was said by this Court, "these results furnish little inducement to establish the principle in our jurisprudence" *(The China, supra).*

So, too, in *Sherlock vs. Alling*, 93 U. S., p. 99, more fully referred to hereafter, this Court in 1876, eight years after the decision of the *Halley* on appeal, deliberately adopted the reasoning of Sir ROBERT PHILLIMORE based on the natural justice of the doctrine, in preference to the narrower rule which had become crystalized in the English statutes; for it will be remembered that the statute gave immunity to the owner irrespective of any common law right.

The question again came before this Court in 1872, more than three years after the case of *The China* was decided and the doctrine was reaffirmed.

The Merrimac, 14 Wall. (81 U. S.), 199.

Again in 1874 the owner was held liable for the negligent act of a pilot causing a collision.

Atlee vs. The N. W. Union Packet Company, 21 Wall. (88 U. S.), 389.

All three of these cases, it is true, were suits in admiralty, but, as pointed out before, the liability was sustained because the common-law liability was found to exist.

The learned Referee seems to have overlooked entirely the case of *Sherlock vs. Alling*, which was an action at common law carried to this Court in error to the Supreme Court of Indiana. It was an action at common law for causing the death of a passenger in a collision on the Ohio River, and the defendants interposed the defense that the steamboat was under the control of pilots compulsorily employed

by them under Act of Congress of March 30, 1852. The case was decided in 1876 and the opinion was written by Mr. Justice FIELD, who participated in the decision of *The China* case, and united with Mr. Justice CLIFFORD in dissenting on the construction of the New York statute. The opinion is so comprehensive and luminous that it is here reprinted in full so far as it deals with this defense.

"In addition to the objection urged to the statute of Indiana, the defendants also contended that, as owners of the colliding vessels, they were exempt from liability to the deceased, as a passenger on one of them, and, of course, to his representatives, as the collision was caused, without any fault of theirs, by the negligence of the pilots; and they relied upon the 30th Section of the Act of Congress of March 30, 1852, to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam. That act was in force when the injuries complained of in this case were committed, and its principal features have been retained in subsequent legislation. The section provided: 'That whenever damage is sustained by any passenger or his baggage from explosion, fire, collision or other cause, the master and the owner of such vessel, or either of them, and the vessel, shall be liable to each and every person so injured to the full amount of damage, if it happens through any neglect to comply with the provisions of law herein prescribed, or through known defects or imperfections of the steaming apparatus or of the hull; and any person sustaining loss or injury through the carelessness, negligence or willful misconduct of an engineer or pilot, or their neglect or refusal to obey the provisions of the law herein prescribed as to navigating such steamers, may sue such engineer or pilot and re-

cover damages for any such injury caused as aforesaid by any such engineer or pilot'" (10 Stat. at L., 72).

"It was argued that, by this section, Congress intended the exemption claimed. And confirmation of this view was found in the fact that the owners were obliged to take a pilot and were restricted in their choice to those licensed by the Government inspectors. It was supposed that the relation between owner and pilot, as that of master and employee, was thus changed, and that with the change the responsibility of the former for the negligence of the latter ceased. The Court, however, proceeded through the trial upon a different theory of the position of the defendants. It held that, as owners, they were responsible for the conduct of all the officers and employees of the vessels, and that it was immaterial whether the vessels were or not at the time of the collision under the exclusive charge of the pilots. The instruction to the jury, at least, went to that extent. They in substance declared that if the collision occurred within the territorial jurisdiction of Indiana, and was caused without fault of the deceased by the carelessness or misconduct of the defendants, or any of their agents, servants or employees, in navigating and managing the steamers, or either of them, the plaintiff was entitled to recover.

"In support of the exemption, the counsel of the defendants called to our attention an opinion of the Supreme Court of Kentucky in a similar case, arising upon the same collision, where such exemption was upheld. The opinion is marked by the usual ability which characterizes the judgments of that Court; but, after much hesitation and doubt, we have been compelled to dissent from its conclusions. The statute appears to us to declare that the owners and master of a steam

vessel, and the vessel itself, shall be liable for all damages sustained by a passenger or his baggage, from any neglect to comply with the provisions of the law, no matter where the fault may lie; and that, in addition to this remedy, any person injured by the negligence of the pilot or engineer may have his action directly against those officers.

"The occasions upon which a pilot or engineer would be able to respond to any considerable amount would be exceptional. The Statute of England, which exempts the owners of vessels and the vessels from liability of faults of pilots, pilotage there being compulsory and pilots being licensed, has not met with much commendation from the Admiralty Courts, and the general tendency of their adjudications has been to construe the exemption with great strictness. This course of decision is very fully stated in the exposition of the law made by Mr. Justice SWAYNE, in the case of *The China*, 7 Wall., 53 (74 U. S., 67), where this Court declined to hold that compulsory pilotage relieved the vessel from liability. In the case of *The Halley*, L. R., 2 Adm. and Eccl., 15, decided as recently as 1867, Sir ROBERT PHILLIMORE strongly questioned the policy of the statute, and said that it appeared to him difficult to reconcile the claims of natural justice with the law which exempted the owner who had a licensed pilot on board from liability for the injuries done by the bad navigation of his vessel to the property of an innocent owner; and observed that no one acquainted with the working of the law could be ignorant that it was fruitful in injustice. The doctrine that the owners are responsible for the acts of their agents and employees ought not be discarded because the selection of a pilot by the owner is limited to those who, by the State, have been found by examination to possess the requisite knowledge of the difficulties of local navigation, and the requisite skill to con-

duct a vessel through them. 'As a general rule,' says Mr. Justice GRIER, in the case of *The Creole*, 'masters of vessels are not expected to be, and cannot be, acquainted with the rocks and shoals on every coast (and, we may add, with the currents and shoals of every river), nor able to conduct a vessel safely into every port. Nor can the absent owners, or their agent, the master, be supposed cabable of judging of the capacity of persons offering to serve as pilots. They need a servant but are not in a situation to test or judge of his qualifications, and have not, therefore the information necessary to choice. The pilot laws kindly interfere, and do that for the owneas which they could not do for themselves' *Smith vs. The Creole* and *The Sampson*, 2 Wall., Jr., 515. And the learned Justice observes, that in such cases where a pilot is required to be taken from those licensed, *the relation of master and servant is not changed; that the pilot continues the servant of the owners, acting in their employ, and receiving wages for services rendered to them, and that the fact that he is selected for them by persons more capable of judging of his qualifications cannot alter the relation.*"

"And in case of *The Halley*, Sir ROBERT PHILLIMORE upon this subject says: 'I do not quite understand why, because the State insists, on the one hand, upon all persons who exercise the office of pilot, within certain districts, being duly educated for the purpose and having a certificate of their fitness; and insists, on the other hand, that the master shall, within these districts, take one of these persons on board to superintend the steering of his vessel, the usual relation of owner and servant is to be entirely at an end; and still less do I see why the sufferer is to be deprived of all practical redress for injuries inflicted upon him by the ship which such a pilot navigates.'

"*By the common law, the owners are responsible for the damages committed by their vessel, without*

any reference to the particular agent by whose negligence the injury was committed. By the maritime law, the vessel, as well as the owners, is liable to the party injured for damages caused by its torts. By that law, the vessel is deemed to be an offending thing, and may be prosecuted, without any reference to the adjustment of responsibility between the owners and employees, for the negligence which resulted in the injury. *Any departure from this liability of the owners of the vessel, except as the liability of the former may be released by a surrender of the vessel, has been found in practice to work great injustice.* The statute ought to be very clear before we should conclude that any such departure was intended by Congress. The section we have cited would not justify such a conclusion. Its language readily admits of the construction we have given, and that construction is in harmony with the purposes of the Act."

Sherlock vs. Alling, 3 Otto (93 U. S), p. 99.

In the Circuit Court for the Eastern District of Louisiana, in January, 1883, the question again came up in admiralty, and these cases were followed as authority.

The act causing the injury was done by the pilot "over the objection of the master." "For this negligence or want of skill the owner or boat is responsible, although a licensed pilot was the real delinquent." Per Mr. Justice PARDEE.

The E. M. Norton, 15 Fed. Rep., 686.

It is respectfully submitted that the learned Referee was in error in refusing to follow the rule of law firmly established by the decisions of this Court, on the ground that such decisions were binding only in Courts of Admiralty.

Having found that the plaintiff in error was remediless in Admiralty, the effect of his decision is to relieve the owner of any liability for the act of a pilot result-

ing in the destruction of a pier, although both he and the vessel would be liable for the same act, resulting in the destruction of an anchored vessel.

THIRD POINT.

The questions certified by the Circuit Court of Appeals are reviewable in this Court.

On the argument in the Circuit Court of Appeals it was urged that, "the Referee having found as matter of fact that the New York Act requires that a pilot in this case is compulsory, that question is not open to review in this Court," and the case of *Shipman vs. Straitsville Central Mining Company* (158 U. S., p. 536) was cited as authority for the proposition.

This action was tried before Hon. William G. Choate, to whom it had been referred as Referee to hear and determine by consent of the parties, according to the rule of the Circuit Court, and, the exceptions filed to his report having been overruled, judgment was directed by the Circuit Court accordingly (fol. 41). The Referee in his report made findings of fact with the conclusion of law that defendant was entitled to judgment dismissing the complaint upon the merits. The thirteenth finding was as follows (fol. 31):

> "THIRTEENTH. The said pilot was not appointed by the owner of said vessel, nor by the master thereof, but the said owner and master were required and compelled by the law of the State of New York to take said pilot and to allow him to take charge of the navigation of said vessel."

The sole conclusion of law was that the complaint should be dismissed, and the plaintiff in error concedes that the facts found by the Referee cannot be re-examined either in this Court or the Circuit Court of Appeals, and that the case above cited is conclusive authority upon that point.

The Circuit Court of Appeals, however, held that the construction of the New York statute was in reality a question of law and not of fact, and that the conclusion of the Referee as to the effect of the statute could, therefore, be reviewed in that Court. That Court has not included the finding of the Referee on this point in the statement of facts, but has certified only that the vessel was navigated under direction of a Sandy Hook pilot, duly licensed under the law of the State. The same point has been recently passed upon by this Court in the case of *Houston and Texas Central Railroad Company vs. State of Texas* (177 U. S., p. 66), where the State Court had found that warrants issued under and by virtue of certain Acts of the Legislature were issued with the intention to have them circulate as money. Mr. Justice PECKHAM, writing the opinion of this Court, said (p. 80):

> "The question whether the Legislature so intended is one to be decided by an inspection of the act under which they were issued, and possibly by reference to the text of other acts of the legislature enacted at or about the same time. Whether an act provides for the issuing of warrants that were intended to circulate as money is in reality a question of law arising upon the construction of the legislative act; and a finding by the Court that warrants issued under and by virtue of certain acts of the legislature were issued with such intention is in the nature of a legal conclusion, and not a finding of fact, and therefore it can be reviewed by this Court."

See, also, *Chicago, Milwaukee and St. Paul Railway Company vs. Clark* (178 U. S., 353):

This case also was tried before a Referee appointed under the same rule, and it was held that both in the Circuit Court of Appeals and in this Court the Referee's findings could be examined to ascertain whether the judgment was supported by the facts found, and his findings would be construed for that purpose.

So, in the present case, while plaintiff in error may not question that the pilot was appointed pursuant to the Statute of the State of New York, the effect of such appointment is a question of law, not a question of fact, and the Circuit Court has so construed it in certifying that question to this Court. That this is the meaning of the Referee's finding is abundantly proven by reference to other parts of the record. The third and fourth defenses (fols. 13 and 14), use the same expression, and the learned Referee, in his opinion (fols. 26–27), discusses the effect of the New York statute, placing his conclusion that the New York Statute created a system of compulsory pilotage upon the authority of the case of *The China (supra)*, without referring to the subsequent cases decided by the New York Court of Appeals.

It is respectfully submitted, therefore, that so far as the finding of the Referee attempts to construe the character of the New York Statute it is a legal conclusion and not a finding of fact.

FOURTH POINT.

It is respectfully submitted that the first question certified to this Court should be answered in the negative, viz.: that the New York laws do not impose compulsory pilotage; and that the second question should be answered in the affirmative, establishing the liability of the owner; and that the case should be remitted for appropriate action in the Circuit Court of Appeals.

WILLIAM H. HARRIS,
Counsel for Plaintfff in Error.

Supreme Court of the United States,

OCTOBER TERM, 1900.

THE HOMER RAMSDELL TRANSPORTATION COMPANY, *Plaintiff in error,* *against* LA COMPAGNIE GÉNÉRALE TRANSATLANTIQUE, *Defendant in error.*	*No. 166.*

CERTIFICATE OF DIVISION FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Statement.

This is an action at common law against the Compagnie Générale Transatlantique, a French corporation operating a line of steamships between New York and Havre, and the owner of the steamship *La Bretagne*, for damages caused to the Pier No. 24, North River, in New York harbor, occupied by the plaintiff in error, under the following circumstances:

La Bretagne was lying at her dock No. 42 North River on the 10th of December, 1892. About five

minutes after 8 o'clock in the morning, the tide being about the last of the ebb, *La Bretagne* was backed out of her slip in order to start on her voyage to Havre. She was in charge of a Sandy Hook pilot, licensed under the laws of the State of New York. The tide being ebb, her wheel was put hard-a-port, and she was backed toward the west side of the river as far as it is usual or safe to bring her. A tug was employed to push her stern up-stream, and her engines were started full speed ahead. She began to turn down the river, but when she had reached about the middle of the river it was observed by the master and pilot, who were together on the bridge, that she had ceased to turn. The master and pilot were in consultation and the master suggested that it might be better to stop her. The pilot, however, thought that she had still room to turn in the river, and did not immediately give the order to slow or stop; but after she had run a short distance further he gave the necessary orders to slow, stop and back at full speed, yet in spite of these precautions she ran into the plaintiff's pier, striking it with her bow at an angle of 45 degrees, some 20 feet or more from the end on the north side, and inflicted considerable damage, for the recovery of which this suit was brought.

The case was commenced originally in the Supreme Court of New York and subsequently removed into the United States Circuit Court for the Southern District of that State. After issue was joined the case was, by consent, referred to the Hon. William G. Choate, formerly Judge of the District Court of the United States for the Southern Dis-

trict of New York, and since that time not only one of the most distinguished and able members of the bar of the City of New York, but an eminent jurist of national repute. The learned referee was "appointed to hear and determine all the issues in the said action."

Record, fols. 2, and 22.

The learned referee in an opinion (which is reported in 63 Fed. Reporter, 848, and will be found in the Record, commencing at page 12), after an exhaustive examination of the case and a thorough review of the authorities, came to the conclusion that, as no negligence had been established against the master or any officer or other servant of the defendant, and as the damage was caused solely by the negligence of the pilot, and as the pilot was not appointed or selected by the owner of the steamship, but was imposed by compulsion upon the latter by the laws of New York, there could be no recovery against the shipowner in an action at common law, where the responsibility rests upon the relation of master and servant, although it was conceded that, had suit been brought *in rem* in the Admiralty for damages inflicted on the water, a recovery might be had under the rules of the maritime law against the ship, as was held by this Court in the case of the *China* (7 Wall., 53). This damage, however, being inflicted not on the water but on the land, the Court of Admiralty could not have taken jurisdiction, and plaintiff's only remedy was at common law. (See the *Plymouth*, 3 Wall., 20).

The referee, in accordance with the practice in such cases, separately found the facts and stated his conclusion of law, and upon the filing of his findings and report, together with his opinion, a motion was made by the defendant for the judgment of the Circuit Court, dismissing the complaint, with costs, in accordance with the decision of the referee.

Pending this motion the plaintiff moved for a new trial upon a case and exceptions, which motion was thereafter denied, and a judgment of the Circuit Court was subsequently entered pursuant to the opinion and decision of the referee.

The plaintiff thereafter sued out a writ of error from the Circuit Court of Appeals for the Second Circuit, and upon the hearing of the case in the latter Court the Judges certified to this Court for its instruction the following questions:

> "*First.*—Whether the provisions of Chapter 467 of the Laws of New York passed June 28, 1853, as amended by Chapter 196 of the Laws of said State passed April 11, 1854; Chapter 243 of the Laws of the said State passed April 3d, 1857; Chapter 930 of the Laws of the said State passed May 16, 1867, and Chapter 548 of the Laws of said State passed May 2, 1870, and consolidated into sections 2093 to 2123, inclusive of Chapter 410 of the Laws of said State passed July 1, 1882, impose compulsory pilotage on foreign vessels inward and outward bound to and from the port of New York by way of Sandy Hook, in view of the decisions of the New York Court of Appeals."
>
> "*Second.*—Whether, in an action at common law, the ship-owner is liable for injuries

inflicted exclusively by negligence of a pilot accepted by a vessel compulsorily."

Summary of Points.

In the presentation of this case in behalf of the defendant in error the following propositions will be insisted upon:

(1). That both questions certified are foreclosed against the plaintiff in error by prior decisions of this Court, and, therefore, should have been ruled by the Circuit Court of Appeals in favor of the defendant in error and not certified to this Court.

(2). That the first question certified, namely, as to whether the New York statutes impose compulsory pilotage, was not before the Circuit Court of Appeals, and, therefore, cannot be properly certified to this Court, inasmuch as that question was a question of fact found by the referee, and not a conclusion of law.

(3). That the distinction in the separate classification of findings of fact and conclusions of law for the purposes of review in an appellate tribunal are substantial and important, and that this distinction cannot be disregarded in the re-examination of cases like the present; and, therefore, this Court is bound, by its rulings in previous cases, to treat the finding of the referee that the New York statute was compulsory, as one of fact and not one of law.

(4). That the objection that the first question certified does not arise in this case is not only supported by the ruling of this Court laid down in the

adjudged cases, but is especially in harmony with the restrictions and limitations imposed upon the review of cases tried by referees.

(5). That, aside from the foregoing reasons, the first question certified is foreclosed on its merits in this Court by the decision in the case of the *China* (7 Wall., 53), which distinctly holds that the New York statute in reference to pilotage is compulsory.

(6). That the decisions of the New York Court of Appeals referred to in the first question certified, and cited by the counsel for the plaintiff in error, do not furnish the rule of decision in this case, and even if so, they are not at all inconsistent with the conclusion of this Court in the case of the *China* (*supra*), that the New York statutes do impose compulsory pilotage.

(7). That independently of the decision of this Court in the case of the *China*, the New York Pilot statutes are compulsory on general principles.

(8). That the New York statutes impose compulsory pilotage on foreign vessels outward bound as well as those inward bound.

(9). That the second question certified is foreclosed as far as this Court is concerned by the recent decision in the case of Ralli *v.* Troop (157 U. S., 386), where this Court said that, notwithstanding its decision in the case of the *China* (7 Wall., 53), to the effect that a vessel would be liable *in rem* in a case of compulsory pilotage, the shipowner nevertheless would not be so liable in an action at common law.

(10). That in considering the second question certified, namely, as to whether the shipowner is liable for

the negligence of a compulsory pilot, the Court, if it should examine the case upon the previous authorities, should, in analyzing the precedents, be guided by a careful discrimination of the classes into which they respectively group themselves, and especially the cases where pilotage has been adjudged to be *compulsory*, and other cases where it has *not* been so regarded.

(11). That the rules of the common law are different in many respects from the rules of the maritime law as administered by the Courts of Admiralty, and, therefore, the rule that a vessel is liable *in rem* for the negligence of a compulsory pilot furnishes no ground whatever for the liability of the shipowner in an action at common law.

(12). That a shipowner is not in any case liable in an action at common law for the negligence of a compulsory pilot, and that the English statute expressly exempting the shipowner from liability in such cases is only *an affirmation of the rule at common law*, which, in that class of cases, would be applied independently of the statute.

(13). That the rule exempting the shipowner from liability for the negligence of a compulsory pilot in an action at common law rests upon the fundamental doctrine of that system of jurisprudence that, in order to constitute the relation of master and servant and to found thereon the rule of *respondeat superior*, the servant must not only be *employed* by, but be under the general *control and direction* of, the master.

(14). That an analysis of the precedents shows that there can be no recovery against a ship-

owner in cases of compulsory pilotage, not only in actions at common law, but in suits *in personam* in the admiralty.

(15). That the American decisions when carefully examined will be found to be in entire harmony with the English authorities upon the questions presented in this case.

(16). That in addition to the fact that the American and English authorities are in harmony with each other when properly analyzed, many of the English cases which were cited in the American decisions and which furnished the bases for *dicta* which has caused the apparent confusion in the cases, have been overruled or reversed on appeal.

(17). That the dictum of this Court in the case of the *China* to the effect that a shipowner would also be liable *in personam*, rested upon cases since overruled or reversed, and as this dictum was not necessary to the decision of that case, it is one of those general expressions which this Court has often declared it would not be bound by in a subsequent examination of the question where the particular point arose.

(18). That the authoritative text writers in this country uphold the doctrine that the shipowner is not liable in an action at common law for the negligence of a compulsory pilot.

(19). That there is neither principle nor authority of law, nor is there any fair and equitable consideration upon which liability should be imposed upon the shipowner in this case.

(20). That, for the foregoing reasons, this Court should direct the return of the first question certi-

fied as not being properly before the Circuit Court of Appeals, or that it should be answered in the affirmative; and as to the second question the answer should be in the negative.

BRIEF OF ARGUMENT IN BEHALF OF DEFENDANT IN ERROR.

First.

Both the questions certified are foreclosed against the plaintiff in error by prior decisions of this Court, and, therefore, should have been ruled by the Circuit Court of Appeals in favor of the defendant in error, and not certified to this Court.

This Court held in the case of the *China*, 7 Wall., 53, that the New York statutes impose a system of compulsory pilotage. It further held in that case that, though the statute was compulsory, the *ship*, considered as the offending thing, was liable *in rem* in the Admiralty. But in the subsequent case of Ralli *v.* Troop, 157 U. S., 386, this Court also held that the case of the *China* was to be considered as limited to suits *in rem* in the Admiralty, and, furthermore, that at common law, where the liability of the shipowner rested upon the relation of master and servant, there could be no recovery against the shipowner for the negligence of a com-

pulsory pilot on the ground that the relation of master and servant did not exist.

This Court has also held in the case of Burgess *v.* Seligman, 107 U. S., 20, and in other cases hereinafter cited, that it will exercise an independent jurisdiction in the construction of State statutes in cases of controversies between citizens of different States; and also that where there is no prior decision of the highest court of a State construing the State statute at the time such construction becomes necessary by this Court, it will not afterwards change its decision, because the highest court of the State subsequently construes the statute differently. Diversity of citizenship, and the fact that at the time the case of the *China* was decided there was no decision of the New York courts construing the statute—(and in fact there is no such decision even now—), make the case of Burgess *v.* Seligman point edly applicable and decisive.

Therefore, this Court having held in the case of the *China* (*supra*) that the New York statute imposes compulsory pilotage; and having held in the case of Ralli *v.* Troop (*supra*) that at common law the shipowner is not liable for the negligence of a compulsory pilot; and having further held in the case of Burgess *v.* Seligman (*supra*), and by other decisions, that, in cases like the present, it will not be governed by the construction of a State statute by the courts of the State, it not only becomes immaterial to enquire into the decisions of the State courts—(which, by the way, will be shown not to differ at all—), but it will be seen at once that both questions certified are fully covered by the prior decisions of this Court.

Second.

The first question certified not being before the Circuit Court of Appeals does not arise upon this record, and is, therefore, not properly certified.

The first question certified is, as before stated, as follows:

> "*First.*—Whether the provisions of Chapter 467 of the Laws of New York, passed June 28, 1853, as amended by Chapter 196 of the Laws of said State, passed April 11, 1854; Chapter 243 of the Laws of the said State, passed April 3d, 1857; Chapter 930 of the laws of the said State, passed May 16, 1867, and Chapter 548 of the Laws of said State, passed May 2, 1870, and consolidated into sections 2093 to 2123, inclusive, of Chapter 410 of the Laws of said State, passed July 1, 1882, impose compulsory pilotage on foreign vessels inward and outward bound to and from the port of New York by way of Sandy Hook, in view of the decisions of the New York Court of Appeals."

This question was not properly before the Circuit Court of Appeals, and, therefore, it is respectfully submitted, will not be considered by this Court on certificate of division.

This being, as before stated, an action at common law which was referred to a referee to hear and determine all the issues therein, is governed by the rule, firmly established, that in such cases the only question before an appellate court is whether the facts found by the referee sustain the

judgment, and that the court cannot review exceptions to the admission or exclusion of evidence, or to findings of fact by the referee, or to his refusal to find facts as requested.

Shipman v. Straitsville Mining Co., 158 U. S., 356;

Roberts *v.* Benjamin, 124 U. S., 64;

Boogher *v.* Insurance Co., 103 U. S., 90;

Bond *v.* Dustin, 112 U. S., 604;

Paine *v.* Central Vermont Railroad Co., 118 U. S., 152;

Andes *v.* Slauson, 130 U. S., 435.

In other words, as was stated in the case of Roberts *v.* Benjamin, 124 U. S., 64 (*supra*), the only questions open to review are whether there was any error of law in the judgment rendered by the circuit court upon the facts found by the referee. The judgment having been entered pursuant to the report of the referee, the facts found by him are conclusive in this Court.

Citing:

Thornton *v.* Carson, 11 U. S., 7 Cranch, 596, 601;

Alexandria Canal Co. *v.* Swann, 46 U. S., 5 How., 83;

York and Cr. R. Co. *v.* Myers, 59 U. S., 18 How., 246;

Heckers. *v.* Fowler, 69 U. S., 2 Wall., 123;

Bond *v.* Dustin, 112 U. S., 604, 606, 607;

Paine *v.* Central Vermont R. R. Co., 118 U. S., 152, 158.

The referee has found distinctly as findings of fact (*a*) that the pilot in question was a duly licensed pilot under and pursuant to the laws of the State of New York; (*b*) that the steamer was navigated under his direction up to the time of the collision; (*c*) that all his orders were promptly and efficiently carried out by the master, officers and crew of the steamship; (*d*) that the pilot was not appointed by the owner of the said vessel nor the master thereof; (*e*) that the owner and master were required and compelled by the law of the State of New York to accept said pilot and allow him to take charge of the navigation of the vessel; (*f*) that the collision and damage resulting therefrom were caused solely by the negligence and want of skill and care on the part of the pilot; and (*g*) that the accident was not caused by any want of skill or negligence on the part of the master, other officers and crew of the steamship.

Upon these findings, the only conclusion of law stated by the referee is that the defendant is entitled to judgment dismissing the complaint upon the merits, with costs to the defendant to be taxed.

See Record, p. 11.

Applying the rule just stated to the Circuit Court of Appeals—(and its application to that Court as an appellate tribunal erected to take the place of this Court in the cases within its jurisdiction cannot for a moment be denied—) it would seem to be obvious that the first question certified was not before that Court and, therefore, could not be certified to this Court for its instruction and decision.

If the plaintiff in error had been dissatisfied with

these findings of fact and had insisted that any of them involved a question of law, as counsel on this hearing now argues, it was incumbent upon the plaintiff in error to move before the referee for a change of his findings. No such motion having been made, it is assumed, of course, that the plaintiff in error acquiesced in them as embodying the referee's decision, and that the findings must stand as they are separately stated as findings of fact and conclusion of law.

The counsel for the plaintiff in error in his brief (p. 29) states that the Circuit Court of Appeals held that the construction of the New York Statute was in reality a question of law and not of fact and that the conclusions of the referee as to the effect of the Statute will, therefore, be reviewed in that Court.

It is sufficient to say that no such ruling appears in the record, and counsel is absolutely in error in making that statement.

Third.

The distinction in the separate classification of findings of fact and conclusions of law for the purposes of review in an appellate tribunal are substantial and important, and this distinction cannot be disregarded in the re-examination of cases like the present.

The first question certified, it will be observed, is but a part of the referee's 13th finding of fact which was as follows:

"*Thirteenth.*—The said pilot was not appointed by the owner of said vessel, nor by the master thereof, but the said owner and master were required and compelled by the law of the State of New York to take said pilot and to allow him to take charge of the navigation of said vessel."

It is manifest from a reading of this finding that the question certified is only a portion of the referee's finding of fact relative to the selection or appointment of the pilot. And, aside from the question as to whether a part of a finding may be extracted from the other parts and made the subject of review, it is plain that the certification of this question, and the submission of it to this Court as a question of law, is an effort to evade the established rule which has been just adverted to, and to impose upon this Court and upon the Circuit Court of Appeals the duty of reviewing a question which, according to established practice, will not be considered.

In other words, to apply the decision of this Court in the case of the Sun Mutual Insurance Co. *v.* Ocean Insurance Co. (107 U. S., 485), where, under the act of February 16th, 1875 (18 Stat. at L., 315), the Circuit Courts in the cases to which the Act referred were required to separately state their findings of fact and conclusions of law, the real question here presented is *not whether the question certified is sound as a conclusion of law, but whether upon that finding as a finding of fact the conclusion of law stated by the referee is correct.*

In that case Mr. Justice Matthews, in delivering the opinion of this Court, said:

> "The facts, *as found and stated* by the court below, *are conclusive*. The case stands here precisely as though they had been found by the verdict of a jury. Or, as it was put in the case of the *Annie Lindsley* (*supra*): 'The question, and the only question, which we can consider is, whether the facts found support the conclusions of law and the decree.' The findings of fact being in the nature of a special verdict, we can go neither behind them nor beyond them. We cannot correct them by inquiring into the evidence, nor supply any omissions by intendment or inference."
>
> * * * * * *

In the case of the Sun Insurance Co. *v.* Ocean Insurance Co., just referred to, there were separate findings of fact and one conclusion of law, and this Court held, in substance, that the conclusion of law stated, although it might be true as a finding of fact, yet, having been stated as a conclusion of law, it would be *so regarded by this Court* and disposed of as such with reference to the findings of fact.

The question in that case was the liability of the defendant upon a contract of reinsurance; and the Court said:

> "It was essential to the establishment of the libellant's right of recovery, to show that the risk insured against by the policy sued on was the same which the libellant was adjudged liable for on its policy to Melcher. The policy of the respondent in this suit, although, in substance, a reinsurance, was not so in form. It did not describe the risk by reference to the policy of The Ocean Company, so that the identity between the two

could be ascertained by mere comparison. It did not, in fact, allude to any such policy. The risk is described solely by words descriptive of the property insured, without a definition of the interest of the assured. It became necessary, therefore, to aver the identity of the two insurances. This the libel does. But as it is denied in the answer, it became necessary to prove it. The finding of facts, however, in the Circuit Court, does not assert it. It contains other facts bearing on the question. But the conclusion itself is stated, not as a fact, but as a conclusion of law from the facts found, the facts and the conclusions of law having been separately stated, as expressly required by the Act of Congress. The first conclusion of law, in the statement made by the Circuit Court, is that 'The Sun Company's policy covers the Rotterdam charter."

"The question, therefore, presented to us on this appeal is, *not whether that might be true as a conclusion of fact from the circumstances stated in the findings of fact, but whether, upon the facts found, it must be true as matter of law.*"

Applying the ruling thus stated, *mutatis mutandis*, to the question now presented, it is obvious, we think, that the first question certified by the Circuit Court of Appeals does not arise upon the record in this case and should not be considered by this Court.

This ruling, though it arose in another class of cases is equally applicable to the present case; for notwithstanding the decision was made in a case under the Act of 1875 relating to findings of fact and conclusions of law in admiralty cases, the rule is precisely the same in cases

of review of a decision by a referee, viz., that the Appellate Court will only inquire whether the conclusion of law is sound in view of the facts as found; and as there is only one conclusion of law in this case, namely, that the defendant was entitled to judgment dismissing the complaint upon the facts as found, the question certified was not open to the Circuit Court of Appeals for review, and is, therefore, not subject to a certificate of division.

Fourth.

The objection that the first question certified does not arise in this case is not only supported by the rule of this Court just alluded to, but is especially in harmony with the restrictions imposed upon the review of cases tried by referees.

In the case of Hecker *v.* Fowler (2 Wall., 123), Mr. Justice Clifford, in delivering the opinion of Court, went somewhat particularly into the history of the practice of referring cases to referees and the effect of their decisions, and in alluding to the case of the Y. & C. Railroad Company *v.* Myers (18 How., 246), he says:

> "Subordinate tribunal, say the Court, must ascertain the facts upon which the judgment or opinion excepted to is founded,

which undoubtedly is correct for the reason there given, that *this Court cannot determine in cases of common law the weight or effect of evidence, nor decide mixed questions of law and fact.*"

The first question certified by the Circuit Court of Appeals in this case is, if not a pure question of *fact*, certainly but *a mixed question of law and fact*, to take the most extreme view in favor of the plaintiff in error. In other words, the conclusion as to whether the statute of New York was imperative to compel the acceptance of the pilot, rested upon a number of circumstances, among which may be mentioned the fact that the vessel in question was a foreign vessel; that the pilot was a duly licensed pilot; that he spoke the steamer upon her entry into the port under circumstances which called for his services as pilot; whether the commander of the steamer voluntarily accepted him, independently of his quality as a licensed pilot or not, etc., etc.; and had the case been tried by a jury, all these facts and circumstances would have called for the submission of the question as to compulsory pilotage to the jury under instructions of the Court. This would undoubtedly have rendered the whole question a simple question of fact, or, at most, a mixed question of law and fact, which, under the decisions just referred to, this Court will not review in any case tried by a referee.

Fifth.

The first question certified is foreclosed on its merits in this Court by the decision in the case of the *China* (7 Wall., 53), which distinctly holds that the New York statute in reference to pilotage is compulsory.

In the case of the *China*, above referred to, this Court held that the statute of New York of April 3d, 1857, and now embodied in Section 2119 of Chap. 410 of the Laws of said State, passed July 1st, 1882, imposes a system of compulsory pilotage.

The Act of 1857, under construction in the case of the *China*, is as follows:

> "All masters of foreign vessels and vessels from a foreign port, and all vessels sailing under register bound to or from the port of New York by the way of Sandy Hook, shall take a licensed pilot; or in case of refusal to take such pilot, shall himself, owners or consignees, pay the said pilotage as if one had been employed; and such pilotage shall be paid to the pilot first speaking or offering his services as pilot to such vessel."
>
> Any person not holding a license as pilot under this act, or under the laws of the State of New Jersey, who shall pilot, or offer to pilot, any ship or vessel to or from the port of New York, by the way of Sandy Hook, except

such as are exempt by virtue of this act; or any master or person on board a steam tug or towboat, who shall tow such vessel or vessels without such licensed pilot on board such vessel or vessels, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by a fine not exceeding one hundred dollars, or imprisonment not exceeding sixty days; and all persons employing a person to act as pilot not holding a license under this act, or under the laws of the State of New Jersey, shall forfeit and pay to the Board of Commissioners of Pilots the sum of one hundred dollars."

Chap. 243, Laws of New York, 1857, p. 502.

These provisions are now embodied literally in Section 2119 of the Consolidation Act of 1882, as follows:

"Sec. 2119. * * All masters of foreign vessels and vessels from a foreign port, and all vessels sailing under register, bound to or from the port of New York by the way of Sandy Hook, shall take a licensed pilot, or in case of refusal to take such pilot, shall himself, owners or consignees, pay the said pilotage as if one had been employed; and such pilotage shall be paid to the pilot first speaking or offering his services as pilot to such vessel. Any person not holding a license as pilot under this title, or under the laws of the

State of New Jersey, who shall pilot, or offer to pilot, any ship or vessel to or from the port of New York by the way of Sandy Hook, except such as are exempt by virtue of this title, or any master or person on board a steam tug or towboat, who shall tow such vessel or vessels, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by a fine not exceeding one hundred dollars or imprisonment not exceeding sixty days; and all persons employing a person to act as pilot not holding a license under this title, or under the laws of the State of New Jersey, shall forfeit and pay to the Board of Commissioners of Pilots the sum of one hundred dollars."

Chap. 410, Laws of N. Y., 1882, Section 2119.

In construing these provisions this Court, in the case of the *China*, said:

"It is insisted by the appellants that the statute referred to compelled the master of the steamship to take the pilot, and that they are, therefore, not liable for the results of his misconduct."

"British adjudications are relied upon in support of both these propositions. In order to appreciate these authorities, the British Pilot Acts must be understood. They are the 52 George III., Ch. 30; the 6 George IV., Ch. 125; the Shipping Act of the 17 and 18

Victoria, Ch. 104; the Liverpool Pilot Act of 37 George III., Ch. 789, and the Newcastle Pilot Act of the 41 George III., Ch. 86. The first three mentioned contain equivalent provisions. The same remark applies to the latter two. The former all contain a clause to the effect that the 'owner or master of any ship shall not be answerable for any loss or damage occasioned by the neglect, default, incompetency or incapacity of any licensed pilot. The latter contain a system of local pilot regulations, but have no such provision. They require that a pilot shall be taken, and if not taken, the pilotage shall, nevertheless, be paid. In these respects, and in most others, they are substantially the same with the Statute of New York."

"Was the steamship compelled to take the pilot?"

"In the case of the *Maria*, 1 W. Rob., 95, in which the Liverpool Pilot Act was largely considered, Dr. Lushington said: 'It never was decided that a clause requiring a pilot to be taken on board, or if not taken, the pilotage to be paid, was not compulsory. * * * Now, the Liverpool Pilot Act provides for three cases: 1. The case of vessels homeward bound; 2. Of vessels outward bound; and lastly, of vessels lying at anchorage, and with reference to homeward-bound vessels, it is provided in the 24th section of the Act that if the master refuses to take a

pilot on board he is liable to the payment of pilotage. There is, therefore, this distinction in the two cases: That in the case of a vessel at anchor, the taking of the pilot on board is perfectly optional with the master, but in the case of a homeward-bound vessel, it is enjoined upon him by the provisions of the Act, and if he refuses so to do, he is rendered liable to the payment of the pilotage dues. This, in my opinion, amounts to compulsion to take such pilot on board, and it was so held by the learned judges by whom the case of Sidebotham *v.* Caruthers was decided. What says Mr. Justice LeBlanc? It appears that the master was compellable to take the pilot on board, and it was in consequence of his misconduct that the vessel was placed in such a situation that when the water left her she fell upon her side, and thus the damage happened.' Without going further into the case, it is sufficient to observe that Lord Ellenborough and Mr. Justice Bailey were of the same opinion that the master was compellable to take the pilot on board." 1 W. Rob., 95.

"Other authorities to the same effect might be referred to, but it is deemed unnecessary. The one we have cited is sufficient."

"Suppose the New York statute, in the event of a refusal to take a pilot on board, instead of full pilotage, had given the vessel or cargo to the pilot. Whether the amount

to be paid were large or small, it would operate in the same way, and involve the same principle. The difference would be not in the fact, but in the degree of compulsion. If it be said the master had the option to pay the pilotage, and proceed without the pilot, the answer is that he would have had the same option if the consequence had been fine and imprisonment, or the visiting upon him of any other penal sanction. In each case there would be compulsion, measured in its force by the means prescribed to make it effectual. A duty is enjoined and an obligation is imposed. The alternatives presented are to receive the pilot, or to refuse and take the consequences."

"In this connection it is proper to consider the particular provisions of the New York Statute. It enacts that the master 'shall take a licensed pilot;' that, in case of refusal, pilotage shall be paid, and that it shall be paid to the first pilot offering his services. Any person not holding a license under this Act, or the law of New Jersey, who shall pilot, or offer to pilot, any vessel to or from the port of New York, by way of Sandy Hook, except such as are exempt by virtue of this Act; or any master on board a steamtug who shall tow such vessel without a licensed pilot on board, shall be punished by a fine not exceeding $100, or imprisonment not exceeding sixty days; and all persons employing a

person not licensed under this Act, or the laws of New Jersey, are subjected to a penalty of $100."

"It was contended by the counsel for the appellee, that if the master had chosen to proceed without a pilot, he would have been liable only to the payment of pilotage; and that none of the other penal provisions of the Statute, according to its true meaning, apply in such a case. We have not found it necessary to examine this subject. Giving to the statute either construction, it seems to us clear, in the light of both reason and authority, that *the pilot was taken by the steamship on compulsion.*"

Sixth.

The decisions of the New York Court of Appeals cited by the counsel for the plaintiff in error are not rules of decision in this case, and, even if they furnished the rule of decision, they are not at all inconsistent with the conclusion of this Court in the case of the *China* that the New York statutes imposes compulsory pilotage.

The counsel for the plaintiff in error states in his brief (p. 10) that, since the decision of this Court in

the case of the *China*, the New York pilot law has been examined by the Court of Appeals of the State and that Court has given a construction to it different from that of the learned referee, and differing from that of this Court in so far as the latter assumed that the law required the employment of the first pilot under the penalty of paying pilotage fees to him, thus giving the master no right of selection from the class; and it is insisted that, in the construction of statutes of a State, this Court will follow the decisions of the highest court of the State, and will only form an independent judgment as to the meaning of the State law where there was no binding construction of such State statute by the court of last resort of the State.

The counsel for the plaintiff in error is mistaken, it is respectfully submitted, not only in his statement of the law supposed to govern this Court in the construction of State statutes in cases like the present, but is also in error in his statement that the New York Court of Appeals has put a construction upon the pilotage acts different from that of the Referee in this case any different from that of this Court in the case of the *China*.

(1). The rule is not, as stated by the learned counsel, that in cases like the present this Court will follow the decisions of the highest court of the State, and will only form an independent judgment as to the meaning of the State law where there was no binding construction of such State statute by the court of last resort of the State; but it has been distinctly held by this Court that, in cases of controversy

between citizens of different States—(which, of course, includes controversies between a citizen of a State and foreign States, citizens or subjects)—it will not be bound by the construction put upon the State statute by the highest court of the State.

This ruling was distinctly laid down in the case of Burgess *v.* Seligman (107 U. S., 20); and in the head-note of that case, prepared by Mr. Justice Bradley, who delivered the opinion, as reported in the reports of this Court published by the Lawyers' Co-operative Publishing Co., Book 27, p. 359, the rule is stated by him as follows:

> "The Federal courts have an independent jurisdiction in the administration of State laws in cases *between citizens of different States* co-ordinate with and not subordinate to that of the State courts, and are bound to exercise their own judgment as to the meaning and effect of those laws."

And in the body of the opinion the learned Justice says:

> "We do not consider ourselves bound to follow the decisions of the State court in this case. When the transactions in controversy occurred, and when the case was under the consideration of the Circuit Court, no construction of the statute had been given by the State tribunals contrary to that given by the Circuit Court. The Federal courts have an independent jurisdiction in the administration of State laws, co-ordinate with and

not subordinate to that of the State courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the State courts, it necessarily happens that, by the course of their decisions, certain rules are established which become rules of property and action in the State, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of State constitutions and statutes."

"Such established rules are always regarded by the Federal courts, no less than by the State courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the Federal court to exercise their own judgment, as they also always do in reference to the doctrines of commercial law and general jurisprudence. So when contracts and transactions have been entered into and rights have accrued thereon, under a particular state of the decisions or where there has been no decision of the State tribunals, the Federal courts properly claim the right to adopt their own interpretation of the

law applicable to the case, although a different interpretation may be adopted by the State courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the Federal courts will lean towards an agreement of views with the State courts if the question seems to them balanced with doubt. Acting on these principles, founded as they are on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well-considered decisions of the State courts. As, however, the very object of giving to the National courts jurisdiction to administer the laws of the States in controversies between citizens of different States, was to institute independent tribunals which it might be supposed would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication. As this matter has received our special consideration, we have endeavored thus briefly to state our views with distinctness, in order to obviate any misapprehensions that may arise from language and expressions used in previous decisions. The principal cases bearing upon the subject are referred to in the margin, but it is not deemed necessary to discuss them in detail."

And as long ago as the December Term of this Court of 1855, Mr. Justice Grier, in delivering the opinion in the case of Pease *v.* Peck, 18 How., 595, said:

> "There are, it is true, many dicta to be found in our decisions, averring that the courts of the United States are bound to follow the decisions of the State courts on the construction of their own laws. But, although this may be a correct, yet a rather strong expression of a general rule, it cannot be received as the enunciation of a maxim of universal application. Accordingly, our reports furnish many cases of exceptions to it. In all cases where there is a settled construction of the laws of a State, by its highest judicature, established by admitted precedent, it is the practice of the courts of the United States to receive and adopt it without criticism or further inquiry. But when this court have first decided a question arising under State laws, we do not feel bound to surrender our convictions on account of a contrary subsequent decision of a State court, as in the case of Rowan *v.* Runnels, 5 How., 139. When the decisions of the State court are not consistent, we do not feel bound to follow the last, if it is contrary to our own convictions—and much more is this the case, where, after a long course of consistent decisions, some new light suddenly springs up, or an excited public opin-

ion has elicited new doctrines, subversive of former safe precedent. Cases may exist, also, when a cause is got up in a State court for the very purpose of anticipating our decision of a question known to be pending in this court. Nor do we feel bound in any case in which a point is first raised in the courts of the United States, and has been decided in a circuit court, to reverse that decision contrary to our own convictions, in order to conform to a State decision made in the meantime. Such decisions have not the character of established precedent declarative of the settled law of a State."

"Parties who, by the Constitution and laws of the United States, have a right to have their controversies decided in their tribunals, have a right to demand the unbiased judgment of the court. The theory upon which jurisdiction is conferred on the courts of the United States, in controversies between citizens of different States, has its foundation in the supposition that, possibly, the State tribunal might not be impartial between their own citizens and foreigners."

The rule of this Court, therefore, especially in cases where the parties represent diverse citizenship, as is the case here, is not as stated by the counsel for the plaintiff in error; but on the contrary, the rule is that the prior decisions of this Court construing a State statute, as is the fact in the case of the *China* (*supra*), will not be disturbed,

because the highest court of the State, whose statute was under construction, had subsequently come to a contrary conclusion.

Therefore, the decision of this Court in the case of the *China*, that the New York statutes impose compulsory pilotage, will, under the rule which has just been referred to, be adhered to by this Court, although the New York Court of Appeals may have decided the question differently.

(2). The only cases cited by the counsel for the plaintiff in error which are supposed to put a different construction upon the New York Pilotage Act from that adopted in the case of the *China* and followed by the referee in this case, are Brown *v.* Elwell, 60 N. Y., 249, and Gillespie *v.* Zittlosen, 60 N. Y., 449.

These cases, it will be found upon examination, however, fail to sustain the point upon which the learned counsel relies.

The case of Brown *v.* Elwell (*supra*) was an action to recover pilotage fees by a pilot duly licensed under the laws of New Jersey, and the only question decided by the Court of Appeals was that a pilot licensed under the laws of New Jersey was a licensed pilot within the meaning of the New York statute, and was, therefore, entitled to recover his pilotage fees. Certainly this decision does not hold that the New York statute is not compulsory.

The only other case cited is Gillespie *v.* Zittlosen, 60 N. Y., p. 449. That was also an action by a pilot who first offered his services, and who was

refused, to recover his pilotage fees; and the decision was that, whilst the shipmaster might refuse the pilot, he was nevertheless liable to pay fees to the first pilot offering his services. Certainly, also, this decision does not hold that the Pilotage Act is not compulsory.

By the term "compulsory" it is not to be understood that a shipmaster may not, if he so elects, absolutely refuse a pilot; for this he may do in any case, subject to the penalties of such refusal. In other words, any one may violate the law if he chooses to do so and take the consequences. This, however, it is respectfully submitted, does not make the operation of that law less binding in a legal sense, because it is the duty of every one to obey the law and not to violate it. And those who obey the law are certainly under the stress of its provisions, and when they have submitted to its operation, the true legal meaning and effect of such submission is that of compulsion in obeying it.

(3). In concluding this branch of the case it may, furthermore, be urged that on account of the fact, as will appear from a further examination of this case, that the New York statutes relating to pilotage are derived very largely from similar provisions enacted by the British Parliament, and presumably furnish the basis for the legislation of other States of the Union in regard to pilotage, they really present rather a question of commercial law and general jurisprudence than of local law, as to which under the rule laid down as long ago as the case of Swift *v.* Tyson (41 U. S., 16 Pet. 1), and followed by

numerous decisions of this Court since that time, this Court and all other Federal courts will exercise their independent judgment and decision.

For these reasons, (1) because the controversy here is between a citizen of a State and a foreign citizen; (2) because this Court, in the case of the *China*, construed the New York pilotage statutes as compulsory, when at that time there was no construction as to that question placed upon them by the highest court of the State; (3) because the cases cited by the counsel for the plaintiff in error really do not show that the New York Court of Appeals has come to a different conclusion from this Court as to the effect and meaning of the statute of the State in question; and (4) because the question presented is rather one of commercial law and general jurisprudence than of the construction of a local statute—for these reasons, it is respectfully submitted, there is no ground whatsoever for this Court to change its ruling laid down in the case of the *China*, to the effect that the New York statutes respecting pilotage are compulsory.

Seventh.

Independently of the decision of this Court in the case of the *China*, the New York pilot statute is compulsory on general principles.

It is a misdemeanor, both at common law and by statute, not to comply with such provisions.

It is a principle that when the common law or a statute forbids the doing of a thing—(in this case refusing to take a pilot)—the doing of it is indictable as a misdemeanor.

1 Chitty Crim. L., 239;
2 Hawk C. P , 171;
Rex *v.* Sainsbury, 4 T. R., 457;
Same *v.* Robinson, 2 Burr., 799;
Same *v.* Wigg, 2 Salk., 460;
Same *v.* Carlisle, 3 B. & A., 161;
People *v.* Norton, 7 Barb., 477.

This principle was enacted into the New York Revised Statutes (2 Rev. Stats., 696, sec. 39) and is now in the Penal Code of that State, (Penal Code, sec. 155,) as follows:

> "Where the performance of any act is prohibited by a statute, and no penalty for the violation of such statute is imposed in any statute, the doing such act is a misdemeanor."

In short, the statute in question is compulsory for three reasons:

1. Because the law requires every vessel from a foreign port to take a licensed pilot, and imposes a penalty for not doing it.

2. Because if a pilot is not taken the underwriters are discharged.

Law *v.* Hollingworth, 3 T. R., 160.

3. Because it is a misdemeanor, and indictable.

N. Y. Penal Code, Sec. 155 (*supra*).

But leaving out of view for the moment any consideration of the penal consequences of the refusal to take a pilot, this Court, in the case of the *China* (*supra*), adopting the view of Dr. Lushington in the case of the *Maria* (1 W. Rob., 95), as we have before seen, said:

> "Suppose the New York statute, in the event of a refusal to take a pilot on board, instead of full pilotage, had given the vessel or cargo to the pilot. Whether the amount to be paid were large or small, it would operate in the same way, and involve the same principle. The difference would be not in the fact, but in the degree of compulsion. If it be said the master had the option to pay the pilotage, and proceed without the pilot, the answer is that he would have had the same option if the consequences had been fine and imprisonment, or the visiting upon him of any other penal sanction. In each case there would be compulsion, measured in its force by the means prescribed to make it effectual. A duty is enjoined and an obligation is imposed. The alternatives presented are to receive the pilot, or to refuse and take the consequences."

Eighth.

Pilotage was compulsory in this case both inward and outward; but whether pilotage for the outward voyage was expressly compulsory or not is altogether immaterial.

The counsel for the plaintiff in error under his "First Point," at the foot of page 12, devotes much attention to arguing that the New York Statute does not impose compulsory pilotage for the *outward* voyage.

In support of this contention the learned counsel relies upon the provisions of Chap. 930 of the Laws of New York of 1867, Sec. 1, p. 2314, now consolidated with other provisions into Chap. 410 of the Laws of 1882, Sec. 2119. The language of the Act of 1867 and the Consolidation Act of 1882 are in exactly the same words, as follows:

> "Any pilot bringing in a vessel from sea, shall, by himself or one of his boat's company, be entitled to pilot her to sea when she next leaves the port, unless, in the meantime, a complaint for misconduct or incapacity shall have been made against such pilot, or one of his boat's company, and proved before the Board of Commissioners of Pilots; provided, however, that if the owner of any vessel shall desire to change such pilot, then the said Commissioners may assign any

other pilot in the same pilot boat to pilot said vessel to sea."

Chap. 930, Laws of New York, 1867, Sec. 1, p. 2314;
Chap. 410, Laws of 1882, Sec. 2119, commonly called the "Consolidation Act."

The Court will observe that the New York Act of 1857, and Section 2119 of the Consolidation Act, above set forth, both provide that "all masters of foreign vessels * * * bound *to and from* the Port of New York by way of Sandy Hook shall take a licensed pilot"; and that the Act of 1867, now embodied in Section 2100 of the Consolidation Act just quoted, merely provides that the pilot bringing in the vessel from sea shall by himself, or one of his boat's company, be entitled to pilot her to sea when she next leaves the port, unless in the meantime a complaint for misconduct or incapacity shall be made against him or one of his boat's company and proved before the Pilot Commissioners; and that the Pilot Commissioners *may* assign any other pilot in the same pilot boat, in case the shipowner shall signify his desire to change the pilot.

Certainly there is no more a *selection* of the pilot by the shipowner in the latter case than in the case of inward pilotage. The selection, if made—and the change can be effected only at the pleasure of the Pilot Commissioners—is that of the Pilot Commissioners and *not* the shipowner.

It would seem, therefore, to be sufficient to dispose of this branch of the argument of the learned counsel for the plaintiff in error to merely refer to the opinion of the learned referee who tried this case.

On that point he says:

> "The provision with regard to outward pilotage is that the pilot who brought in the ship has the right by himself, or one of his boat's company, to take her out unless he has been complained of for misconduct; subject, however, to the right of the shipowner to object to this particular pilot, in which case the Commissioners of Pilots shall assign another pilot, from the same boat's company to take the ship out."
>
> (3 Rev. Stat. 2017, 2019, 2020.)
>
> "If the shipowner were at liberty to select a pilot out of a class of pilots licensed by the State it could not be held that the shipowner was compelled to take the particular pilot employed. But the right to object to one particular pilot, certainly, does not make the appointment of another selected by the Commissioners from the same boat's crew a voluntary appointment by the owner of the vessel of such substituted pilot."
>
> See Record, fols. 26 and 27.

But it is of no consequence, even if true whether outward pilotage is expressly compulsory or not,

although that construction of the statute is denied. The fact that the pilotage was originally compulsory would render it immaterial if, afterward or at the particular point where the collision took place, the pilotage was not compulsory; because it has been decided that the shipowner is exempt from liability in case a compulsory pilot is on board, *although at the spot where the collision occurs there is no compulsion to take a pilot on board.*

Thus a vessel bound to London took a London pilot off Dungeness, where his employment was compulsory. A collision occurred by the pilot's fault on the voyage up the river at a spot within the port of London, but short of the ship's destination. It was held that, even conceding that the ship could not have been compelled to take on board a pilot at the place where the collision occurred, the shipowners were, nevertheless, not liable for the collision. The engagement of the pilot having been in the first instance, compulsory, and the right and duty of the pilot under that engagement being to navigate the ship to her destination, the decision was that the relation of master and servant never arose between the owners and the pilot so as to make the owners liable for the pilot's acts.

General Steam Navigation Company *v.* British and Colonial Steam Navigation Company, L. R. 3, Ex. 330; S. C., affirmed 4 Ex., 238.

See also

The Charlton, 8 Asp. Mar. Law Cas., 29.

Ninth.

The second question certified might, if necessary, be disposed of summarily in favor of the defendant in error by a brief reference to a very recent decision of this Court.

The second question certified is: "Whether, in an action at common law, the shipowner is liable for injuries inflicted exclusively by negligence of a pilot accepted by a vessel compulsorily."

Although the second question presented by this certificate of division will be discussed at length in this brief, it is thought that counsel for the defendant in error might, if necessary, content himself by citing, as foreclosing the same, the recent decision of this Court in the case of Ralli *v.* Troop (157 U. S., 386), in which Mr. Justice Gray, in considering the case of the *China* (7 Wall., 53), in which it was held, as above stated, that the New York statutes impose compulsory pilotage, but that notwithstanding such compulsion a recovery might be had *against the offending vessel*, irrespective of any liability of the owner *in personam*, used this language:

> "The authority of the pilot, as regards general average, was not touched by the decision of this Court in the *China* (7 Wall., 53), by which a vessel, in charge of a pilot whom she had been compelled by law to take

on board, and brought by his negligence into collision with another vessel, was held, upon a libel *in rem*, to be liable in damages to the owners of that vessel. That decision proceeded, *not upon any authority or agency of the pilot, derived from the civil law of master and servant, or from the common law, as the representative of the owners of the ship and cargo;* nor upon the law of contribution in general average as between them; *but upon a distinct principle of the maritime law, namely, that the vessel in whosesoever hands she lawfully is, is herself considered as the wrongdoer, liable for the tort, and subject to the maritime lien for the damages* (7 Wall., 68). As said by Mr. Evarts, in his argument for the libellants: This theory treats the faults of conduct in the vessel's navigation as imputable to the vessel itself, and discards as immaterial all considerations touching the adjustment among the navigators, or between them and the owners of the personal fault or personal responsibility of the misgovernment of the vessel" (7 Wall., 56.)

And Mr. Justice Brown, with whom concurred Mr. Justice Harlan in the same case, whilst dissenting from the other Justices as to the main question decided, nevertheless agreed with the majority of the Court as to the true construction of the decision of this Court in the case of the *China*, and as to the rule of law there laid down. The learned Justice, upon this question, said:

"A case which seems to me to be more closely allied in principle to the one under consideration is that of the *China* (7 Wall., 53), in which this Court held, contrary to the English, but comformably to the continental authorities, that a vessel was liable for the consequences of a collision through the negligence of a pilot taken compulsorily on board, *although it was admitted that, if the action had been at common law against the owner, and probably also in personam in admiralty, there could have been no recovery, as a compulsory pilot is in no sense the agent or servant of the owner.* The opinion must necessarily rest upon the ground that the vessel is in some sense herself a principal, and any one having lawful command of her is, for the time being, her agent, for whose conduct she is herself responsible, both in contract and in tort. The principle of the case is, that a person who is exercising the authority of a master by operation of law is to be considered as master *pro hac vice*, and as invested with authority as such."

This ruling, unanimously concurred in by all the Justices of this court so recently as the October Term, 1894, and so pointedly and decisively disposing of this question, would seem to be conclusive of this branch of case, and might be relied upon as furnishing a complete and decisive answer to the second question certified.

Tenth.

In considering the second question certified, the Court, in analyzing the precedents, should be guided by a careful discrimination of the classes into which they respectively group themselves.

In considering the second question certified the Court, in examining the authorities, should carefully discriminate the two classes of cases which lay down a different rule of liability in cases of compulsory pilotage from that obtaining in cases where pilotage is not compulsory.

The plaintiff, having brought his action at common law, must be governed by the rules of that system of jurisprudence, whatever may be the rule otherwise in admiralty; and in the consideration of this point the attention of the Court is invited to a few general considerations.

(1). It should be borne in mind, in the first place, that the whole doctrine of responsibility of the master for the servant is a technical one in any case and rests upon the slim basis that where one of two innocent parties is to suffer for an injury inflicted by a servant, the one who has *chosen the servant* is called upon to respond, simply from the fact that he has voluntarily *selected* him.

(2). In the next place, the Court is requested to consider the distinction between the rules of

the common law and the rules of the maritime law, as will be hereinafter pointed out, from which it will appear that the maritime law with respect to many questions constitutes a distinct and separate system of jurisprudence in many respects different from the common law under which this action is brought.

(3). Again, the Court is furthermore requested in the examination of the precedents respecting the liability of a shipowner for the negligence of a pilot, to distinguish between those cases where a pilot has been found to be *compulsory*, and those where the pilot has *not* been found to be compulsory.

Too much stress, it is respectfully submitted, cannot be laid upon this distinction. The omission to keep it in view was the cause of the apparent confusion and contrariety of decision in the English courts for many years, as will appear from an examination of the cases of the *Protector*, 1 Wm. Rob., 55, 56; the *Maria*, 1 Wm. Rob., 105, 107, 108; the *Agricola*, 2 Wm. Rob., 11, 20 and 21; and the *Eden*, 2 Wm. Rob., 442, extracts from which are hereinafter fully set forth. The same omission to keep this distinction in mind has also occasioned a misapprehension of the proper weight as precedents of many of the American cases, which, it will appear upon examination, are really in entire harmony with the British decisions, as will be hereafter shown.

The distinction between cases of voluntary and cases of compulsory pilotage in respect of the re-

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sponsibility of the shipowner is recognized and conceded in the discussion of the cases even by counsel seeking to establish the liability of the shipowner, and notably in the case of General Steam Navigation Company *v.* The British and Colonial Steam Navigation Company, Limited (L. R., 4 Exch. Cas., 238), where Mr. Pollock, Q. C., contending for the responsibility of the shipowner on the ground that the pilot was not compulsory in that case, nevertheless, conceded that the rule of responsibility would be different if the pilotage had been *compulsory.*

Upon that point he said:

> " The owner, as *dominus navis*, is bound to conduct his vessel so as not to do injury to others; he cannot excuse himself on the ground that he has, by a voluntary stipulation, subjected himself to the will of another, the *Ticonderogo* (Swab., 215). He is liable for all acts, whether of the pilot or of the crew, except such as are done by a pilot imposed upon him by statute, the *Diana* (1 Wm. Rob., 131), as was the case in *Bowcher* v. *Noidstrom* (1 Taunt., 568). That this is so, is shewn by the distinction which has always been made in the cases between compulsory and voluntary pilotage, which is an old and well-established one, *Carruthers* v. *Sydebotham* (4 M. and S., 77, at p. 85), *Neptune the Second* (1 Dodson, 467), *Attorney-General* v. *Case* (3 Price, 302), and lastly, the *Maria* (1 Wm. Rob., 95, at p. 99) where

the immunity in the case of compulsory pilotage is placed on general principles. The recent case of the *Halley* (Law Rep., 2 P. C. C., 193) in the Privy Council shews the distinction to be still recognized. The same doctrine is laid down in *Story on Agency*, s. 456a."

Gen. Steam Nav. Co. *v.* British and Col. Steam Nav. Co., L. R., 4 Ex. Cas., 238, 242.

(4). The Court is also requested to bear in mind that the case of the *China*, 7 Wallace, 53, as well as many others upon which the plaintiff in error so confidently relies, rests upon the distinct ground that the action being *in rem* the ship primarily was the offending thing, thus raising a lien which the maritime law impresses upon her and enforcible against the ship, irrespective of the owner.

(5). Another consideration to be taken into account is the liberality of modern legislation and the general trend of judicial decision in favor of restrictions and limitations of the shipowner's liability in cases generally, notably the legislation of the Act of 1851 (9 Stat., 635, Sec. 3; R. S. 4283) exempting the shipowner from all liability beyond his interest in the ship and freight for negligence without his privity or knowledge, which exemption is extended by the Act of June 26, 1884 (23 Stat., 57, Sec. 18) so as to relieve the shipowner from all liability whatsoever beyond such interest, irrespective of his privity or knowledge; and furthermore, by what is known as the "Harter Act" of February 13, 1893 (27 Stats., 445) exempting the shipowner from all

liability upon bills of lading where he is not shown to have failed to exercise due diligence to make his ship seaworthy, and also by the long line of decisions of this Court to the effect that a shipowner is not liable for negligence resulting in death on the high seas (*The Harrisburg*, 119 U. S., p. 199). In other words, the general tendency of legislation and judicial decision being in the line of narrowing the liability of the shipowner for the purpose of encouraging maritime venture, the leaning of the Court in marginal and doubtful cases should be rather to exempt the shipowner than to extend his liability.

6. Another consideration of very vital significance in this case is the fact that the master of the *Bretagne* foresaw the danger and warned the pilot, and had the master's warning been heeded there would have been no collision. Certainly if there ever was a case where this Court should be astute to exempt the shipowner this is one.

It is thought that these considerations and distinctions will materially lighten the labors of the Court in the examination of the second question certified.

Eleventh.

The rules of the common law are different in may respects from the rules of maritime law as administered by Courts of Admiralty.

That there are differences, both in the procedure and in the substantial jurisprudence between the

common law and the maritime law, appears by all the authorities.

These distinctions were adverted to by this Court in Atlee *v.* N. W. Union Packet Co., 21 Wall., 389.

In that case the Court says:

> " But the plaintiff has elected to bring his suit in an admiralty court, which has jurisdiction of the case, notwithstanding the concurrent right to sue at law. In this Court the course of proceeding is in many respects different *and the rules of decision are different.* The mode of pleading is different, the proceeding more summary and informal, and neither party has a right to trial by jury. An important difference as regards this case is the rule for estimating the damages."
>
> " In the common law court the defendant must pay all the damages or none. If there has been, on the part of plaintiffs, such carelessness or want of skill as the common law would esteem to be contributory negligence, they can recover nothing. By the rule of the admiralty court, where there has been such contributory negligence, or, in other words, when both have been in fault, the entire damages resulting from the collision must be equally divided between the parties. This rule of the admiralty commends itself quite as favorably in its influence in securing practical justice, as the other; *and the plaintiff who has the selection of the forum in*

which he will litigate cannot complain of the rule of that forum."

"It is not intended to say that the principles which determine the existence of mutual fault on which the damages are divided in admiralty are precisely the same as those which establish contributory negligence at law that would defeat the action. *Each court has its own set of rules for determining these questions, which may be in some respects the same, but in others vary materially.*"

So, also, in the case of the *China*, 7 Wall., 53, the same distinction—(which constituted the real point in judgment)—was again affirmed.

In that case the Court said:

"*According to the admirally law the collision impresses upon the wrong-doing vessel a maritime lien. This the vessel carries with it into whosesoever hands it may come.* It is inchoate at the moment of the wrong, and must be perfected by subsequent proceedings. *Unlike a common law lien*, possession is not necessary to its validity. It is rather in the nature of the hypothecation of the civil law. It is not indelible, but may be lost by laches or other circumstances. *The Bold Buccleugh*, 7 Moore, P. C., 284; Edwards *v.* the *Stockton*, Crabbe, 580; the *American*, 16 Law Rep., 264; the *Lion*, Law Rep., Nov., 1868 (Adm. & Eccl.), 102."

The distinction between the jurisprudence of the admiralty and that of the common law is also instructively discussed by Judge Holmes in his work on the "Common Law."

He says (p. 25):

> "I must for the moment leave the common law and take up the doctrines of the Admiralty. In the early books which have just been referred to, and long afterwards, the fact of *motion* is adverted to as of much importance. A maxim of Henry Spigurnel, a judge in the time of Edward I, is reported, that 'where a man is killed by a cart, or by the fall of a house, or in other like manner, and the thing in motion is the cause of the death, it shall be deodand.' (Y. B. 30 and 31, Ed. I, pp. 524, 525; cf. Bract., fol. 136*b*). So it was said in the next reign that '*omne illud quod movet cum eo quod ocidit homines deo dandum domino Regi erit vel feodo clerici.*' (Fitzh. Abr. Corone, pl. 403). The reader sees how motion gives life to the object forfeited."
>
> "The most striking example of this sort is a ship. And accordingly the old books say that, if a man falls from a ship and is drowned, the motion of the ship must be taken to cause the death, and the ship is forfeited—provided, however, that this happens in fresh water. (Bract., 122; 1 Britton (Nich.), top p. 16; Fleta, I., c. 25, § 9, fol. 37). For if the death took place on the high seas, that

was outside the ordinary jurisdiction. This proviso has been supposed to mean that ships at sea were not forfeited (1 Hale, P. C., 423); but there is a long series of petitions to the King in Parliament that such forfeitures may be done away with, which tell a different story (1 Rot. Parl., 372; 2 Rot. Parl., 345, 372 *a*, *b*; 3 Rot. Parl., 94*a*, 120*a*, 121; 4 Rot. Parl., 12 *a*, *b*, 492*b*, 493. But see 1 Hale, P. C., 423). The truth seems to be that the forfeiture took place, but in a different court. A manuscript of the reign of Henry VI, only recently printed, discloses the fact that, if a man was killed or drowned at sea by the motion of the ship, the vessel was forfeited to the admiral upon a proceeding in the admiral's court, and subject to release by favor of the admiral or the king (1 Black Book of the Admiralty, 242)."

"A ship is the most living of inanimate things. Servants sometimes say 'she' of a clock, but every one gives a gender to vessels. And we need not be surprised, therefore, to find a mode of dealing which has shown such extraordinary vitality in the criminal law applied with even more striking thoroughness in the Admiralty. It is only by supposing the ship to have been treated as if endowed with personality, that the arbitrary seeming peculiarities of the maritime law can be made intelligible, and on that supposition they at once become consistent and logical."

"By way of seeing what those peculiarities are, take first a case of collision at sea. A collision takes place between two vessels, the *Ticonderoga* and the *Melampus*, through the fault of the *Ticonderoga* alone. That ship is under a lease at the time, the lessee has his own master in charge, and the owner of the vessel has no manner of control over it. The owner, therefore, is not to blame, and he cannot even be charged on the ground that the damage was done by his servants. He is free from personal liability on elementary principles. Yet it is perfectly settled that there is a lien on his vessel for the amount of the damage done (Cf. *Ticonderoga*, Swabey, 215, 217), and this means that that vessel may be arrested and sold to pay the loss in any admiralty court whose process will reach her. If a livery-stable keeper lets a horse and wagon to a customer, who runs a man down by careless driving, no one would think of claiming a right to seize the horse and wagon. It would be seen that the only property which could be sold to pay for a wrong was the property of the wrongdoer."

"But, again, suppose that the vessel, instead of being under lease, is in charge of a pilot whose employment is made compulsory by the laws of the port which she is just entering. The Supreme Court of the United States holds the ship liable in this instance

also. (*China*, 7 Wall., 53.) The English courts would probably have decided otherwise, and the matter is settled in England by legislation. But there the Court of Appeals, the Privy Council, has been largely composed of common law lawyers, and it has shown a marked tendency to assimilate common-law doctrine. At common law one who could not impose a personal liability on the owner could not bind a particular chattel to answer for a wrong of which it had been the instrument. But our Supreme Court has long recognized that a person may bind a ship, when he could not bind the owners personally, because he was not their agent."

"It may be admitted that, if this doctrine were not supported by an appearance of good sense, it would not have survived. *The ship is the only security available in dealing with foreigners, and rather than send one's own citizens to search for a remedy abroad in strange Courts, it is easy to seize the vessel and satisfy the claim at home, leaving the foreign owners to get their indemnity as they may be able.*"

Holmes, The Common Law, p. 25.

The learned author further discusses the subject at some length, but the foregoing extract, it is thought, will be sufficient to illustrate the point under consideration.

The distinction between the substantive structure

of the admiralty or maritime law, and the local civil or common law is also illustrated by the very recent case of Workman *v.* New York City, decided at the present term of this Court, and reported in 179 U. S., 552.

In that case this Court held that, in a suit in admiralty there might be a recovery for damages for negligence, although by the law of the State had the action been brought at common law there could have been no recovery.

Workman *v.* N. Y. City, 179 U. S., 552.

A case much more in point, and which, it has been argued, is decisive of the question presented here, is the case of Ralli *v.* Troop, already adverted to, and quoted from, under the ninth point of this brief, where this Court held that the case of the *China* (7 Wall., *supra*) rested upon the distinct ground that in a proceeding *in rem* a vessel was regarded as the offending thing, and was for that reason liable; but that the rule at common law was different, and, therefore, in an action at common law, like the present, there could be no recovery against the shipowner for damages caused exclusively by the negligence of a compulsory pilot.

(See Ralli *v.* Troop, *supra*).

Besides these authorities, many points of difference between the rules of the maritime law and those of the common law may be instanced.

(*a*). In the first place, it may be mentioned that the whole system of hypothecations in admiralty

enforceable by proceedings *in rem* is not recognized at all at common law.

(*b*). So, too, the case of general average contribution may be noted. This is a right utterly unknown to the common law, and a Court of common law could not be resorted to to enforce it. It is true that where goods are released on a general average bond, a Court of common law may enforce the bond, but the right, in that event, is merged into *something else*, *i. e.*, into the bond. In other words, it is the bond and not the right which furnished the consideration of the bond that is recognized at common law, and if no bond were exacted, the right to contribution would receive no recognition at all in a common law Court.

(*c*). So, also, in the case of disputes between the majority and minority shipowners. In that case, if the minority object to an operation or adventure proposed by the majority, the latter may in the admiralty require the majority to give security for the safe return of the ship; but no such right as this is recognized at common law or even in equity.

(*d*). So, also, in the case of contributory negligence referred to by this Court in the case above cited, the plaintiff is not debarred in admiralty from recovering damages, even though he be negligent himself; whereas, at common law, if he is guilty of any negligence whatsoever contributing to the accident, he is utterly debarred from recovery.

It follows, therefore, that these two systems of law are clearly distinct, and both rights and forms

of procedure—rights recognized and followed under one system—are in many instances not recognized or followed under the other at all.

Twelfth.

A shipowner is not liable in an action at common law for the negligence of a compulsory pilot, and the English statute expressly exempting the shipowner from liability in such cases, is only an affirmation of the rule of common law.

The question as to whether the shipowner is liable for the acts of the pilot under this system of law, depends upon whether or not the pilot is the *servant* of the shipowner.

This is clearly the rule at common law, whatever may be the rule under adjudged cases in proceedings *in rem* in the admiralty; and this being an action at common law, the common law rule must apply.

There is an apparent conflict between some of the authorities as to the question generally; but the cases are easily reconcilable when considered with reference to whether the pilot was *compulsory* or *not* compulsory.

In England since the Act of 52 Geo. III, Ch. 39 (Sec. 30), it is expressly provided by statute that

the shipowner shall not be liable for the negligence of a pilot taken on board in pursuance of or by compulsion of law.

See 52 Geo. III, Ch. 39, Sec. 30;
6 Geo. IV, Ch. 125, Sec. 55;
17 and 18 Vic., Ch. 104, Sec. 388.

But this legislation is only an affirmation of the rule at common law, as will be shown hereafter. In other words, if pilotage be *compulsory*, the shipowner is *not liable even at common law, independently of the statutory exemption.* If, on the other hand, pilotage is left *optional*, the shipowner *is* liable. And the decided cases group themselves into these two classes.

The distinction for which we contend, and the rule at common law, independently of the English Statute, was declared by Dr. Lushington in the case of *Maria*, 1 Wm. Rob., 95, 109.

That distinguished jurist says:

> "If the taking of a pilot on board was *compulsory* and the collision was occasioned by the fault of the pilot, I shall hold the owners *exempt* from responsibility *upon general principle without reference to acts of Parliament*, for in that case *the pilot was not their servant*, and the maxim *qui facit per alium, facit per se* does not apply. *If, on the contrary*, the taking of a pilot is *voluntary*, then he was the servant of the owners, and the owners are responsible," &c.

So also in the case of the *Halley* decided in the English Privy Council in 1868, Lord Justice Selwyn, in delivering the opinion advising Her Majesty, said in reference to *compulsory* pilots:

> "Assuming, as, for the purposes of this appeal their Lordships are bound to assume, the truth of the facts stated in the pleadings, and applying the principles of the *common law* and statute law of England to those facts, it appears that the tort for which damages are sought to be recovered in this cause was a tort occasioned solely by the negligence or unskilfulness of a person (a compulsory pilot) who was *in no sense the servant* of the appellants, a person whom they were *compelled* to receive on board their ship, in whose *selection* they had no voice, whom they had no power to remove or displace, and who, so far from being bound to receive or obey their orders, was entitled to supersede, and had, in fact, at the time of the collision, superseded the authority of the master appointed by them; and their Lordships think that the maxim *qui facit per alium facit per se* cannot by the law of England be applied as against the appellants under such circumstances; *and that the tort upon which this cause is founded is one which would not be recognized by the law of England as creating any liability in or cause of action against the appellants.*"
>
> The *Halley*, L. R., 2 Priv. C., App. Cas., 193, 202.

Thirteenth.

The distinction rests upon the fundamental doctrine of the common law that, in order to constitute the relation of master and servant, and to found thereon the rule of *respondeat superior*, the servant must not only be *employed* by, but be under the *general control and direction* of the master.

The rule is illustrated in a number of cases.

In the case of Laugher *v.* Pointer, 5 Barnwell & Cresswell, 547, it was held (and the doctrine has since been affirmed in later cases) that the owner of a carriage hiring horses of a stable keeper who sent his own driver, was not liable for an injury done whilst the carriage was so driven.

Laugher *v.* Pointer, 5 B. & C., 547.

In the case of Reedie *v.* North Western Ry. Co., 4 Ex., 244, which was an action to recover damages resulting from the fall of a stone from a railway track in process of construction by a contractor who had full charge of the work, it was held that the railway company was not liable.

The Court (Baron Rolfe) in delivering the opinion in that case, said:

> "In the case of Quarman *v.* Burnett, this Court decided (adopting the opinion of Lord

Tenterden and Mr. Justice Littledale, in Laugher *v.* Pointer), that the liability to make compensation for an injury arising from the neglect of a person driving a carriage, attaches only on the driver, or on the person employing him. The liability of any one, other than the party actually guilty of any wrongful act, proceeds on the maxim, '*Qui facit per alium facit per se.*' The party employing has the selection of the party employed, and it is reasonable that he who has made choice of an unskilful or careless person to execute his orders, should be responsible for any injury resulting from the want of skill or want of care of the person employed; but neither the principle of the rule, nor the rule itself, can apply to a case where the party sought to be charged does not stand in the character of employer to the party by whose negligent act the injury has been occasioned. The doctrine of Quarman *v.* Burnett has since been acted on in this court, in the case of Rapson *v.* Cubitt, and in the Court of Queen's Bench, in Milligan *v.* Wedge, and again in Allen *v.* Hayward."

"By these authorities we must consider the law to have been settled; and the only question is, whether the law, so settled, is applicable to the facts of this case."

Reedie *v.* North Western Ry. Co., 4 Ex., 255.

So also in Milligan *v.* Wedge, 12 A. & E., 737. In that case a butcher who had bought a bullock, employed a licensed drover to drive it home, none but licensed drovers being allowed to drive bullocks. The drover employed a boy to drive the animal, which did damage through the boy's careless driving. Denman, C. J., says:

> "The party sued has not done the act complained of, but has employed another, who is *recognized by the law as exercising a distinct calling*. The butcher was not bound to drive the beast; he might not know how to drive it. He employs a drover, who employs a servant, who does the mischief. The drover therefore is liable, and *not the owner of the beast*. * * * So as to *decisions upon the pilot acts* when it is not *necessary* to employ a pilot, the master who has *voluntarily* employed one is liable for his act."

So Williams, J.:

> "Where the person who does the injury *exercises an independent employment* the party employing him is clearly not liable."

And Coleridge, J.:

> "I make no distinction between the drover and the boy. Suppose the drover to have committed the injury himself. The thing done is the driving. The owner makes a contract with the drover that he shall drive the beast, and leaves it under his charge, and then the drover does the act. The relation,

therefore, of master and servant does not exist between them."

Again, in another case where it appeared that the master and crew of a vessel were bound to obey the directions of a *harbor master* in going into dock, and a collision occurred by the ship being conducted according to harbor master's directions, the ship was held not to be liable.

In delivering his decision in the latter case, Dr. Lushington said:

> "I certainly hold by the judgment I delivered in the case of the *Maria*. I then well considered the point, and under circumstances which made a great impression upon my mind. I had to endeavor to reconcile two apparently conflicting decisions: Carruthers *v.* Sydebotham, in the Queen's Bench, and Attorney-General *v.* Case, in the Exchequer, and I there said that no one should be chargeable with the act of another who is not an agent of his own choice. That principle still appears to me founded in equity, and it applies to the present case with more force than to the case of the *Maria*. A shipowner cannot be responsible for obeying, under compulsion of the statute, the orders of the harbour master, who is a stranger to him. This plea, if established, is a good defense to the action."

The *Bilbao*, Lush., 149, 153.

So, also, "where a ship is being worked by a charterer or hirer who appoints and pays the officers and crew under a charter-party or agreement which amounts to a demise of the vessel, the owner is not liable for damage she may do while in the possession of the charterer. But if the owner remains in possession of the ship, either by himself or his agents, he is liable, though she is under charter to another."

Marsden on Collisions, 3d Ed., pp. 70, 71;
Scott *v.* Scott, 2 Starkie, 438.

Again, in another case, where a vessel was chartered by the public authority as a transport and is engaged in an expedition in which it, in common with others, is subject to general command, her owners were held not liable for damages to another vessel of the same fleet occasioned in consequence of compliance with orders from the commanding authority.

Hodgkinson *v.* Fernie, 2 C. B. (N. S.), 415.

So, also, a steamship company is not liable for the negligence of a physician and surgeon carried on board, whether compelled by law to have such physician or not.

Laubheim *v.* Dek. N. S. Co., 107 N. Y., 228.
O'Brien *v.* Cunard S. S. Co., 28 North Eastern Rep. (Mass.), 266; S. C., 154 Mass., 272.

Fourteenth.

An analysis of the precedents shows that there can be no recovery against a shipowner in case of compulsory pilotage.

The earliest reported case in England was decided by Sir William Scott in the English High Court of Admiralty in 1814. This case has been considered by some judges as an authority against the point for which we contend; but it will be shown that this error has resulted from (1) the fact that the proceeding was a suit *in rem* in the Admiralty, and (2) not keeping in mind the distinction between compulsory pilotage, and pilotage which is not compulsory. The whole report of the case, so far as it relates to this subject, is as follows:

> "It is acknowledged in this case that the damage was done by the ship proceeded against; but it has been set up, in the way of excuse, that she was, at the time, under the care of a regular pilot, and was acting in obedience to his directions; and it has been contended, in the argument, that the pilot alone is answerable for any damage that may have been sustained in consequence of the mismanagement of the vessel. If the position could be maintained, that the *mere fact of having a pilot on board, and acting in obedience to his directions,* would discharge

the owners from responsibility, I am of opinion that they would stand excused in the present case; for I think it is sufficiently established in proof, that the master acted throughout in conformity to the directions of the pilot. But this, I conceive, is not the true rule of law. The parties who suffer are entitled to have their remedy *against the vessel* that occasioned the damage, and are not under the necessity of looking to the pilot, from whom redress is not always to be had, for compensation. The owners are responsible to the injured party for the acts of the pilot, and they must be left to recover the amount as well as they can against him. It cannot be maintained *that the circumstances of having a pilot on board, and acting in conformity to his direction*, can operate as a discharge of the responsibility of the owner."

The *Neptune the Second*, 1 Dodson, p. 467.

Whilst this case is one in which the shipowner's exemption was denied, it by no means follows (as was thought in some of the cases hereinafter referred to) that the distinguished Judge who decided it was of the opinion that the shipowner was liable in *all* cases for the acts of the pilot and whether compulsory or not, especially as this decision was made subsequently to the enactment of 52 Geo. III, Ch. 39, which took away liability in

the latter case by statute; but, on the contrary, the meagerness of the report leaves it to be inferred that the ship in question was either (1) a foreign vessel and, therefore, not required to take a pilot, as was held in some of the earlier cases; or (2) was not on pilotage ground; or (3) that her situation did not require her to be under the command of a pilot at the time, as for instance if while at anchor she was suffered to drag and foul another vessel; or (4) that the pilot on board was not a compulsory pilot, but the mere employee of the owners.

This is the view of the case of the *Neptune the Second* taken by Dr. Lushington, in the case of the *Eden*, 2 Wm. Rob., 442, where he says:

> "It may be asked, who were the pilots of whom Lord Stowell was speaking? Clearly not the persons of whom, in earlier times, the class of pilots consisted, namely, a body of persons not appropriated to the local navigation of vessels by any competent authority, but *persons promiscuously plying about* in the neighborhood of ports and channels and taken on board by the masters at *their own option* for the purpose of conducting their vessels where a local knowledge and experience was required."
>
> See the *Eden*, 2 Wm. Rob., 442.

The report of the case is, in any event, altogether too much lacking as to the facts to render it an authority of impressive weight; and as it is reconcilable with the decisions holding the shipowner

liable in cases where pilotage is *not* compulsory, it should properly be grouped with that class. At all events, it is not an authority against the rule that the shipowner is not liable when pilotage is *compulsory*, for the existence of the statute expressly declaring the shipowner not liable in such case absolutely negatives such an assumption.

The next case in point of time is that of Attorney-General *v.* Case and others, decided in the Court of Exchequer in 1816 and reported in 3 Price, 302.

In that case the question was whether or not the Local Pilot Act of Liverpool was compulsory and required the master to have a pilot on board whilst lying at anchor, the injury having been done by a vessel anchored in the Mersey and drifting against another. The Court held that the act *did not* oblige the master to have a pilot in *that situation* and held the owners liable, intimating that were it otherwise, the result would have been different.

After examining the Local Pilot Act of Liverpool in connection with the General Pilot Act of 52 Geo. III, the Court, through Chief Baron Thompson, said:

> "There is, therefore, *no obligation imposed* by the 37 Geo. III, upon the master, to take any pilot whatever on board his vessel *before she proceeds on her voyage;* for the consequence of his refusing to take a pilot on board, on other occasions, is only a liability to pay the same wages as if he had taken such pilot on board. Now, if he was proceeding to sea, having taken such pilot

on board; and if, while the ship was duly and properly under the management of that pilot, an accident had happened, it might have been a fair question, whether the owner would then have been answerable; though there have been cases which show, that though a pilot may be on board, the master is in some instances deemed responsible, notwithstanding. But, I repeat, there is no such penal provision in this act of the Liverpool Pilotage. By the 34th section of that act, indeed, it is provided, 'that if the owner, master or commander, shall require the attendance of a licensed pilot on board any ship or vessel during her riding at anchor, or being at Hoylake' (which is lower down than Liverpool), 'or in the river Mersey' (that is, while she is riding at anchor), 'such pilot shall attend such ship or vessel, and be paid for every day he shall so attend, five shillings, and no more.' So that there is nothing here compulsory upon the master or owner to take on board a pilot, *while he is riding at anchor in this river Mersey.* It is *optional* to him whether he will do it or not; but, if he chooses to do so, he is to pay the pilot at the rate of five shillings for every day he shall attend, and no more. His *obligation* to take a pilot (even if the act of the 37th is to be taken as connected with the act of the 52d of the king), is only on his proceeding to sea, and refusing to take on board

a pilot so licensed. There is no penalty for not taking on board a pilot while lying in the river Mersey; but he is *enabled*, if he thinks fit (and not otherwise), to *command the services of a pilot* while so lying at anchor, paying for him at the rate here specified; and it is for that accommodation that he is *to pay the five shillings*, if he refuses to take the pilot on board. The master of the king's ship states that this vessel was outward bound; she had been lying there a considerable time; she was not, at this time, proceeding on her voyage. The master seems to have made his *election* to have a pilot on board, though she was lying entirely at anchor, and not proceeding upon her voyage. Then, what is there in this case which authorizes the Court to say that the master is not responsible under the circumstances which have been so detailed? He was not compellable at that time, in any way, either under the penalty of double the wages, or of paying even the single wages, to have any pilot on board. It was *his own act* to have him; and it can be only in the case of such an officer having been *forced* upon them, and *without his own election*, that the responsibility of the owner can possibly be discharged."

Attorney-General *v.* Case and others, 3 Price, pp. 321, 322 and 323.

The next case is that of Carruthers *v.* Syde-

botham, decided in the King's Bench in 1815, and reported in 4 Maule & Selwyn, 77.

In that case a ship, being under the conduct of a pilot, was proceeding in her course up the Mersey, and, against the advice of the master, was fastened at the pier of the dock basin by a rope to the shore and left there, in which condition she took ground, careened over, and, when the tide rose, filled with water, in consequence of which her cargo was damaged, and it was held that the underwriters were liable.

The questions were (1) whether this was a *stranding* within the terms of the policy, and (2) whether the accident was to be considered as having happened through the misconduct of the servants of the shipowner, in which case the underwriters would have been discharged.

Lord Ellenborough (whose views were concurred in by LeBlanc and Bayley, JJ.) said:

> "Two questions arise upon this case. First, whether a stranding of the ship has taken place, in which event only the underwriter will be liable for damage to this species of commodity; and in this case the ship has lain on the strand, the commodity has had sea water upon it and has been damaged, which is one of the perils insured against; and all this happened in the course of the voyage. For whether the ship was under the conduct of the pilot or the master, the damage is equally a damage in the course of the voyage, and so within the scope of the

policy. The only remaining question then is, whether that which has happened is to be considered as having happened through the misconduct of the master and mariners, from which the underwriter is exempted. Now to make the pilot the representative of the master, and consequently to exempt the underwriter from liability for his acts, it must first be shown that there is a *privity* between the pilot and the master, so that the one may be *considered as the representative or agent of the other.* But does the master appoint the pilot? Certainly not. The regulations of the general pilot act impose a penalty upon the master of every ship which shall be piloted by any other person than a pilot duly licensed, within any limits for which pilots are lawfully appointed. And there is an exception of such places for which pilots are not appointed. But if the master cannot navigate without a pilot except under a penalty, is he not under the compulsion of law to take a pilot? And if so, is it just that he should be answerable for the misconduct of a person, whose appointment the provisions of the law have taken out of his hands, placing the ship in the hands and under the conduct of the pilot? The consequence is, that there is no privity between them. In general, if there be a damage arising from a marine peril, unless that damage be induced by the act of the master, or mariners, or owner of

> the ship, it is a damage within the scope of the policy. Here has been a stranding which has occasioned an average loss, for which the underwriter will be responsible unless it has been occasioned by the party's own act. And how can that be, unless the act of the pilot who is imposed upon the master by law, is to be considered as his act? It appears to me, therefore, that the underwriter is liable; because this does not fall within the description of a damage that has been caused by the act of the assured themselves, but by the act of the pilot, between whom and the assured there was no privity. The same principle, I think, governed the case of Nicholson *v.* Mounsey (15 East, 384)."

Carruthers *v.* Sydebotham, 4 Maule and Selwyn's Reports, pp. 84, 85, 86.

The opinions of LeBlanc and Bayley, JJ., are principally taken up in determining whether there was a "stranding," and also an examination of the statute to determine whether or not it obliged the master to take and follow the directions of the pilot; but they both concurred with Lord Ellenborough, and Mr. Justice Bayley added.

> "And this being the case where the master of the ship was bound at his peril to take a pilot on board, he cannot be identified with the pilot so as to make the damage that has happened through his neglect a damage occasioned by the neglect of the master or owner."

The next case was Bennett *v.* Moita, decided in the Court of Common Pleas in 1817, and reported in 7 Taunton, 258.

In that case it was held that where a vessel, having on board a compulsory pilot, pursuant to 52 Geo. III, and causing damage in consequence of the neglect of the pilot, the master was not liable, but that *the action must be brought against the pilot.*

The next reported case (Ritchie *v.* Bowfield, 7 Term R., 309) occurred in the same year (1817) as the preceding case, and was decided by the same Court (Common Pleas).

This case was mainly on the construction of the Act of 52 Geo. III, Ch. 39, Sec. 30, and the principal question was whether the words "loss or damage" in that section extended to cases of collision or was confined to loss or damage of the cargo. It was held that it did not extend to cases of collision, and that the owners, having on board a compulsory pilot, as required by Sec. 11 of the Act, were not liable.

Ritchie *v.* Bowfield, 7 Term R., 309.

The law thus rested until the case of the *Christiana*, decided in the High Court of Admiralty in 1828, and reported in 2 Hagg., 183.

In that case it was held that the offending vessel having been in the charge of a pilot as required by law the owners and their bail should be dismissed as not being liable.

The *Christiana*, 2 Hagg., 183.

The question seems not to have again engaged the attention of the Courts until 1834, when Sir John Nicoll passed upon it in the High Court of Admiralty in the case of the *Girolamo*, 3 Hagg., 169.

This case has also been misunderstood and in some instances cited as an authority against the immunity from responsibility for compulsory pilotage. But such was not the decision at all, for it was expressly held, so far as that branch of the case was concerned that the pilot was *not* compulsory.

The facts were that the *Girolamo*, an American vessel, left the London docks with a licensed pilot on board and in tow of a steamer. After passing Blackwall, a fog came on during which she ran foul of another vessel moored a little below Woolwich and in the proper place for vessels. The case was disposed of on the main ground that the accident was due not to the negligence of the pilot, but to that of the master.

On the point as to whether the ship and owners would be liable if the negligence had been that of the pilot, the learned Judge held that they would be liable because the pilot was *not* compulsory.

At the outset of the case the learned Judge said:

> "If either a British or a foreign vessel take a pilot, *when not required by law to do so*, such pilot is the servant of the owner, who is responsible for his acts."

And in another part of the case the learned Judge observed:

"In the first place, it is by no means clear that a foreign ship is *compellable* to take a pilot, for there are no means of compelling a foreign vessel outward bound, and having actually commenced her voyage, to do so. A foreign vessel may indeed be compelled to pay the pilotage, whether she has a pilot on board or not, by the second section; and that clause and some others strongly infer that a pilot ought to be taken on board, not only for the purpose of protecting the foreign vessel herself, but others which may be in her way—British vessels and British property within our own harbors; but if the master should neglect to take a pilot, there are no means of enforcing the penalties against him. If, then, the taking of a pilot on board be considered as the *voluntary act* of the foreign master, the pilot is, *in such case*, the servant of the foreign master and owner, and they must seek their indemnity from him; but it may not be necessary for the Court now to decide this point."

The *Girolamo*, 3 Hagg., 169, 175.

It, therefore, follows that the case of the *Girolamo* is one of the cases in which the owners were held liable, because the pilot was *not* compulsory.

It should be furthermore observed of this case that the decision of Sir John Nicoll that a foreign vessel is not bound to take a pilot was afterwards overruled. See The *Christiana*, 2 Hagg., 185, 189; The *Maria*, 1 Wm. Rob., 95.

Then comes the case of the *Baron Holberg*, decided in the same Court, and by the same Judge (Sir John Nicoll), in 1835.

That case, too, has been thought to be an authority against the immunity of the shipowner from responsibility for the negligence of a compulsory pilot; but this is an absolute mistake. The *Baron Holberg* was a foreign vessel and was held liable, as in the case of the *Girolamo*, on the ground that the statute requiring the master to take a pilot was not obligatory upon foreign vessels. Even counsel in the argument said that "it was not his intention after the decision in the case of the *Girolamo* to argue that the fact of a licensed pilot in charge would relieve the owners of a *foreign* ship from an action *in rem;*" and the learned Judge in his decision does not even mention, much less discuss, the question, but evidently disposes of it upon the assumption that the point was sufficiently decided in the *Girolamo*.

The *Baron Holberg*, 3 Hagg., 244.

The next case in which the subject received consideration arose before Dr. Lushington in 1839 in the case of the *Protector*, reported in 1 Wm. Rob., p. 46.

In that case the eminent Judge took the view contended for in this case and attempted to reconcile the apparent conflict in the preceding decisions.

After reviewing the cases the learned Judge said:

> "Where the appointment rests with the owner himself, as in the case of the master

and crew, it is reasonable that he should be held responsible for their acts who are agents selected by himself; and he is bound to provide persons of adequate skill, diligence and sobriety. But where a person is compulsorily put on board the vessel, and the owner's authority is superseded by legislative enactment, it would be a violation of all justice to hold such owner responsible for the skill, sobriety and caution, of an individual with respect to whom he has no power of selection; whose qualifications he has no opportunity of deciding upon, but which are to be ascertained and determined by others; the owner himself being entirely debarred from any possibility of interference. On the words of the statute, therefore, and upon principles of equity and justice, I am bound to hold the owners relieved from all responsibility, where the accident has been occasioned according to the words of the statute, 'from or by reason or means of any neglect, default, incompetency, or incapacity of any licensed pilot acting in charge of the vessel.'"

"In the view which I have thus taken of the question before the Court, I find myself supported by the authority of the cases, the Attorney-General *v.* Case; Mackintosh *v.* Slade; and Carruthers *v.* Sidebottom. These cases have been cited in the arguments of counsel, and they all tend to satisfy my mind

of the correctness of the principle upon which my opinion has been formed."

"In the case of the Attorney-General *v.* Case, reported in the third volume of Price's Reports, upon what ground was the vessel doing the damage, and having a pilot on board, held not to be exempt from responsibility? The ground upon which the owner's exemption was overruled in that case was this, that the pilot was taken on board under a local act, and not under the general act; and that it was optional for the master to take one or not."

"Again, what was the principle laid down by Mr. Justice Bayley in the case of Mackintosh *v.* Slade, reported in the sixth Barnwell and Cresswell? Why, the very principle I have adopted in the present instance; that where an owner is compelled to take a pilot on board, and a damage is occasioned whilst the vessel is under the management of that pilot, the owner is relieved from the responsibility. The words of Mr. Justice Bayley in delivering the judgment in that case were these: 'We are of opinion that the master was bound at the time to have a pilot on board, and consequently that the owners are exempt from responsibility.'"

"Lastly, in the case of Carruthers *v.* Sidebottom, which was tried before Lord Ellenborough, that learned Judge, in delivering his judgment, expresses his opinion in the

following terms: 'Does the master appoint the pilot? Certainly not. The regulation of the General Pilot Act imposes a penalty upon the master of every ship which shall be piloted by any other person than a pilot duly licensed within any limits for which pilots are lawfully appointed, and there is an exception for which pilots are not appointed. But if the master cannot navigate without a pilot, except under penalty, is he not under the compulsion of law to take a pilot? And if so, is it just that he should be answerable for the misconduct of a person whose appointment the provisions of the law have taken out of his hands, placing the ship in the hands and under the conduct of the pilot? The consequence is, that there is no privity between them.'"

"Thus confirmed in my view of the present question, I am clearly of opinion, that upon this point of law, assuming all the facts to be as I have stated, the having a pilot on board in pursuance of the act will work an exemption from liability where the damage arises from the neglect, default or incompetency of the pilot."

The *Protector*, 1 W. Rob., 55, 56.

The question arose again before the same Judge in a case shortly following in 1839, namely, the case of the *Maria*, 1 Wm. Rob., 95.

In that case it was held, contrary to previous rulings, that the statute requiring licensed pilots

also applied to foreign vessels, and that they and their owners were also exempt from liability where damage was done by the pilot; and the learned Judge again went into a review of the previous decisions in reference to the general liability of shipowners for the acts of compulsory pilots.

After a review of the exemption expressly provided by the British Statute, the learned Judge proceeded to say:

> "*Now I am of opinion that, independently of the express provisions in those statutes, the compulsory taking of a pilot does, upon general principles, relieve the owner from all responsibility for his acts.* Observe the expression of Mr. Justice Le Blanc, 'independently of the general principle, the Pilot Act provides,' &c. Although, therefore, his judgment was founded upon the opinion that the 55th Section did apply to the Liverpool Act in the particular case he was deciding, he clearly recognized the general principle, *and this principle is one that is recognized by common sense and justice all over the world.* Supposing, then, the General Pilot Act not to apply in this case, is not the general principle alone sufficient to exonerate the owners? I think it is, and for this reason; upon general principle, a man is answerable for the acts of his servants, for injuries done by them to others within the scope of their employment; and why? Because he selects them, and the selection is voluntary. But if a man is compelled to employ another, the

principle upon which liability depends wholly fails."

"These are nearly the words in which Lord Chief Justice Eyre laid down the principle of law respecting the responsibility of owners. If it were necessary to trace the principle further, I might refer to the case of Nicholas *v.* Mounsey, reported in 3 East; but it is not necessary to go into the consideration of that case. I may here, however, notice that it has been said that a contrary doctrine has been laid down by Chief Justice Mansfield, in the case of Nordstrum *v.* Boucher, but on looking to the report, it is evident that the doctrine said to have been delivered by Chief Justice Mansfield applied to a very different case. Then what is the result, upon my mind, of the two important cases to which I have so fully adverted, leaving out of consideration the question of the general operation of the Pilot Act, and its applicability to pilots appointed by local authorities? It is this,—I think both cases were rightly decided,—the case of the Attorney-General *v.* Case, because there was no compulsion to take a pilot; that of Carruthers *v.* Sidebottom, because the taking a pilot was compulsory, and the insurers were only liable upon that ground, and not otherwise. After this long but, as I conceive, necessary preliminary examination of the cases and principles on which they were de-

cided, I now come to the present case, and I shall apply the principles I have laid down to it."

"If the taking of a pilot on board was *compulsory*, and the collision was occasioned by the fault of that pilot, *I shall hold the owners of* The Maria *exempt from responsibility, upon general principle, without reference to acts of Parliament, for in that case the pilot was not their servant*, and the maxim *qui facit per alium facit per se*, does not apply. If, on the contrary, the taking a pilot was voluntary, then he was the servant of the owners, and the owners are responsible, unless the General Pilot Act, which takes away responsibility, applies to a foreign vessel so circumstanced, and to cases where it is optional to take a pilot or not."

The Maria, 1 W. Rob., 105, 107 and 108.

Another case occurred in 1840, in the English Exchequer, namely, the case of Lucy *v.* Ingram, reported in 6 Mees. & W., 302.

In that case the question was whether the pilot was still compulsory after the vessel had arrived and discharged and was being removed to a dry dock. The Court held that though the pilot was not, strictly speaking, still compulsory, yet, being still on board, the equity of the statutory exemption should be extended to the owners and they were accordingly discharged.

See Lucy *v.* Ingram, 6 Mees. & W., 302.

Dr. Lushington had occasion to consider the question again in 1843 in the case of the *Agricola*, 2 Wm. Rob., 11.

In that case the learned Judge said:

> "I have already in former instances been called upon to consider the construction of the Pilot Acts, and in so doing I had occasion to refer to the previous decisions which had been made with regard to those acts. In referring to those decisions, it was my misfortune to find that the interpretations put upon the statutes had not been uniform or consistent; and in this conflict of authorities in the cases of *The Protector* and *The Maria*, I felt myself bound to form my own opinion, and having bestowed the most anxious consideration upon the subject, to determine the question according to the best of my own judgment. It would not, I think, tend to throw any light upon the present case if I were to repeat the observations which I made in deciding those cases. Thus much, however, I may premise, in approaching the consideration of the question which I have now to determine, namely, that I shall continue to adopt the principles of law which I laid down in the cases of *The Protector* and *The Maria*, until my decision in those cases is overruled by a superior Court, and by those principles I shall be guided in determining the present case, unless any novelty should be found in its circumstances to raise a distinction in its favor." * * *

And further on, after considering the facts, the Judge continued:

> "Being, then, of opinion that the master of *The Agricola* was compelled to take a pilot, I have now to consider how far the owners of this vessel are exonerated from the consequences of such pilot's misconduct. In the investigation of this point in this case I must look to the General Pilot Act, 6 G. IV, cap. 175. The Liverpool Pilot Act contains no express exoneration, and no construction has been put upon that act that, *per se*, it confers upon the owners any exemption from liability. The question then arises, is this responsibility taken away by the General Pilot Act? This question is obviously attended with no little difficulty, and for this reason, namely, that it has already been raised before the Court of King's Bench and the Court of Exchequer, and the judges of those courts entertained very different conclusions with respect to the construction of the act of parliament; the Court of King's Bench holding that the General Act did operate upon the Liverpool Act, the Court of Exchequer as clearly holding that it did not. In determining this question in reference to the present case, I shall adopt the same course which I pursued in the case of *The Maria*, and, without taking upon myself the difficult task of deciding upon the conflicting opinions of such high authorities as

the Court of King's Bench and the Court of Exchequer, I shall be guided by the *general principle upon which my judgment was founded in the case of* The Maria, *namely, that wherever a man is compelled by the law to employ a particular individual in the performance of a given service, the law (which imposes the obligation upon him) must take away his responsibility for the acts of that individual whom he is so compelled to employ.* Applying this principle to the circumstances of the case before me, I am of opinion that the defense of the owners of *The Agricola* is a valid defense, and that they have established their exemption from the responsibility of this collision."

Then the same Judge discussed the case in another aspect, namely, whether the owners would have been liable even though they were *not compelled* to take the pilot, but had one pursuant to law.

On this subject the Judge said:

"Before I close my observations upon this case I will shortly advert to an argument which has been urged by the counsel for the owners of *The Agricola*, that even if the taking a pilot on board was *not* compulsory, yet, if a pilot should be taken in pursuance of the provisions of an act of parliament, the liability of the owners, upon general principle, is thereby discharged. In support of this

position the Court was referred to the decision in the case of Lucy *v.* Ingram. Reference was also made to the case of Milligan *v.* Wedge, reported in the twelfth volume of Adolphus & Ellis' Reports. Now in the case of Lucy *v.* Ingram, a pilot was taken voluntarily by the master of a vessel, and as such pilot was taken under the provisions of the statute, he being compellable to go on board if required, and the 55th section of the act having directed that no person shall be responsible for the acts of a pilot taken on board under the provisions of the statute, the Court of Exchequer was of opinion, that, although the master was not compelled to take the pilot, yet, being taken by virtue of the statutory enactment, the owners were not responsible for the acts of such pilot. The case, therefore, of Lucy *v.* Ingram is clearly distinguishable from the case suggested, and I am not prepared to extend the principle upon which that case was decided to the case of a pilot voluntarily taken on board, under the provisions of the Liverpool Pilot Act, unless the act of 6 G. IV applies to that act. Assuming that it does not apply, I am not prepared to say that, if the pilot had been voluntarily taken on board this vessel, the owners would not be responsible for the acts of that pilot. If the doctrine contended for be true, that the responsibility would not attach upon general principle, the

discussions in the Court of King's Bench and Exchequer would have been unnecessary; and looking to the persons by whom the question was argued and determined in those courts—the chief, Baron Thompson, being one of the judges, than whom a more careful judge never sat upon the bench—I cannot but think that if such an argument would have been held good, it would have been noticed in the argument of counsel, or adverted to in the judgment of the Court."

"With respect to the case of Milligan *v.* Wedge, I do not think that case will bear out the proposition in support of which it has been cited."

"In that case, the purchaser of a bullock employed a licensed drover to drive it from Smithfield to the butcher's shop. The drover employed a boy, and mischief was occasioned through the careless driving of the boy so employed. The Court held that the purchaser was not liable for the damage, and for this reason, namely, that by the by-laws of London he was compelled to employ the licensed drover in the first instance; he had, therefore, no choice as to whom he should employ. Between that case, therefore, and the present case there is this distinction, that in the present case the owners of *The Agricola* might, by law, have employed their own master in navigating their vessel, subject to the penalties to which I

have already adverted. In the case of Milligan *v.* Wedge the purchaser was, *ex necessitate*, compelled to employ the licensed drover. The principle, therefore, upon which that case was determined does not apply in the present case. In deciding the present question my judgment is founded *solely upon the principle* which I laid down in the case of *The Maria*, namely, that the master of *The Agricola* was *bound* to take the pilot on board, and the collision having been occasioned entirely by the misconduct of that *pilot*, the owners of *The Agricola cannot be made responsible*. I therefore dismiss them from this suit."

The Agricola, 2 Wm. Rob., 20 and 21.

So, too, in the case of *The Eden*, 2 Wm. Rob., 442, Dr. Lushington held that the shipowner was liable because the pilot was not taken by compulsion.

In the beginning of his opinion, however, the learned Judge re-affirmed his previous decisions and made the following observations, especially in regard to the decision of Lord Stowell in the case of the *Neptune the Second* (*supra*):

"When the Court pronounced its judgment in this case, that *The Eden* was to blame, and that no misconduct was imputable to *The Welcome Return*, a question was reserved for further consideration—how far the owners of *The Eden* were relieved from

responsibility under the provisions of the Pilot Act, the collision having occurred in the harbor of Cork, and *The Eden* being at the time in charge of a pilot duly licensed to act as pilot in that locality. This question I have now to determine; and looking to the difficulties which have heretofore been experienced, and to the conflicting decisions which have been delivered in other Courts, I am glad that I have taken time to deliberate upon the subject, although perhaps my own original impression has not been changed by the arguments which have been urged in the present instance. It is not unimportant to the consideration in question to bear in mind the view which Lord Stowell entertained in the case of *The Neptune the Second*, a case which is reported in the first volume of Dodson's Reports, page 467. The decision in that case was wholly independent of any reference to legislative enactments. From my own recollection of that case I am satisfied that no allusion was made to any Act of Parliament, and in delivering his judgment, Lord Stowell declared in most explicit terms, that the owners of vessels were responsible to the injured parties for the misconduct of pilots taken on board. It may be asked who were the pilots of whom Lord Stowell was speaking? Clearly not the persons of whom in earlier times the class of pilots consisted, namely, a body of

persons not appropriated to the local navigation of vessels by any competent authority, but persons promiscuously plying about in the neighborhood of ports and channels and taken on board by the masters at *their own option*, for the purpose of conducting their vessels where a local knowledge and experience was required. Long previous to the time when Lord Stowell delivered his judgment in *The Neptune the Second* pilots had been incorporated by charter, and their duties and privileges regulated by Acts of Parliament. As early as the reign of George the First there were statutes for the regulation of pilots, relating more especially to those who navigate on the river Thames. These Acts of Parliament, it must be assumed, were not unknown to the very learned judge who decided the case of *The Neptune the Second;* and in his decision in that case Lord Stowell must be understood to assert, that by the common law of the Court of Admiralty, independent of all statutory enactments, the having on board a pilot duly licensed and authorized to act as pilot, did not exempt the owners from a responsibility for the acts of that pilot."

"The opinion thus expressed by that very eminent Judge was not only his own individual opinion, but was obviously the received opinion of this Court from the earliest periods; for surely it is not assuming too

much to say, that, if the fact had been otherwise, cases would have occurred and decisions would have been found where the contrary doctrine had been established, namely, that the owners were exempt from responsibility upon the mere fact that a licensed pilot was on board. Without referring to other authorities in this Court upon the point, I may here observe, that the same opinion has been entertained at least once in the courts of common law, in the case of the Attorney-General *v.* Case, where the Court of Exchequer held that the owners of the vessel were liable, although the vessel was in charge of a duly licensed pilot. The judgment in that case rested upon the assumption that the pilot was taken on board *not* by compulsion but *voluntarily*, and, as far as I am informed, the same principle has been adopted in all cases where the taking the pilot was *not* compulsory, or where the liability was not taken away by act of parliament, as in the case of Lucy *v.* Ingram."

The *Eden*, 2 W. Rob., 444 and 445.

The next case arose in the Privy Council before Lord Chemsford, Lord Kingsdown, and the Right Hon. Sir Edward Ryan, in July, 1860. This was the case of the *Peerless*, reported in Lushington, p. 103.

The Court found as a fact in that case that the pilot was *not* compulsory, and therefore held the

owners liable, declining to discuss the general principles on which the right of exemption is founded.

The *Peerless*, 1 Lush., 103.

After that Dr. Lushington had the question again before him, namely, in the case of the *Bilbao*, Lush., 149, in which he said:

> "I certainly hold by the judgment I delivered in the case of the *Maria*. I then well considered the point, and under circumstances which made a great impression upon my mind. I had to endeavor to reconcile two apparent conflicting decisions; Carruthers *v.* Sydebotham, in the Queen's Bench; and Attorney-General *v.* Case, in the Exchequer, and I there said that no one should be chargeable with the act of another who is not an agent of his own choice. That principle still appears to me founded in equity, and it applies to the present case with more force than to the case of the *Maria*. A shipowner cannot be responsible for obeying, under compulsion of the statute, the orders of the harbor master, who is a stranger to him. This plea, if established, is a good defence to the action."

The *Bilbao*, Lush., 153, 154.

Then came the case of the *Annapolis* and the *Johanna Stoll*, Lush., 295.

In that case the question was whether a foreign vessel was subject to compulsory pilotage, and, if

so, entitled to exemption from responsibility for the pilot's negligence.

Dr. Lushington held that a foreign vessel was subject to compulsory pilotage, and that the owners were exempt, saying:

> "But whether the Merchant Shipping Act applies to this case or not, I am of opinion that the owners of the *Annapolis* are exempt from responsibility by reason that the employment of the pilot was compulsory; the pilot was not their servant or agent; they could not avoid intrusting him with the management of the vessel. In the case of the *Maria*, I have stated at some length my reasons for coming to this conclusion. I believe that the doctrine I then maintained, and now adhere to, is consonant with justice, supported by authority, and is in strict accordance with the principle adopted by the Legislature in the Merchant Shipping Act. I, therefore, pronounce against the claim brought by the owners of the *Johanna Stoll*."

The *Annapolis* and the *Johanna Stoll*, Lush., 312.

The question seems to have rested in the English Admiralty until after the death of Dr. Lushington and the accession of Sir. Robert Phillimore as Judge of the High Court of Admiralty, when in 1867 that learned Judge had before him the case of the *Halley*, reported in L. R., 2 Adm. and Ecc., 3.

In the course of his decision Sir Robert Philli-

more questions the expediency of the law of compulsory pilotage, so far as it exempts the owner of the wrongdoing vessel from all liability; but his judgment was reversed in the Privy Counsel in the same case, reported in L. R., 2 P. C. App. Cas., 193. Lord Justice Selwyn, delivering the opinion, among other things, said:

> "Assuming, as for the purposes of this appeal their Lordships are bound to assume, the truth of the facts stated in the pleadings, and applying the principles of the Common law and Statute law of England to those facts, it appears that the tort for which damages are sought to be recovered in this cause was a tort occasioned solely by the negligence or unskillfulness of a person who was in no sense the servant of the appellants, a person whom they were compelled to receive on board their ship, in whose selection they had no voice, whom they had no power to remove or displace, and who, so far from being bound to receive or obey their orders, was entitled to supersede and had, in fact, at the time of the collision, superseded the authority of the Master appointed by them; and their Lordships think that the maxim, '*qui facit per alium facit per se*,' cannot by the law of England be applied as against the appellants, to an injury occasioned under such circumstances; and that the tort upon which this cause is founded is one which would not be recognized by the

law of England as creating any liability in, or cause of action against, the appellants."

The *Halley*, L. R., 2 P. C. App. Cas., 202.

A further question in that case was whether in an action by the owners of a foreign vessel against a British steamer for a collision in the waters of a country to which neither vessel belonged, and whose law did not exempt the shipowner for negligence of a compulsory pilot would be enforced in a suit in England, and the Privy Council held that it could not apply the foreign law and decided that the shipowner was not liable.

This review, so far as we are aware, presents all the English cases in which the question has distinctly arisen.

Fifteenth.

The American decisions are in entire harmony with the English cases upon the question presented here.

The cases in this country do not at all conflict with the English decisions upon the point raised in this case, when considered with reference to the distinction sought to be kept in mind in this brief, that is to say, when considered with reference to the question as to whether pilotage is *compulsory* or *not* compulsory.

The American cases are: Bussey *v.* Donaldson, 4 Dallas, 206, decided in the Supreme Court of Pennsylvania in 1809; Williamson *v.* Price, decided in the Supreme Court of Louisiana in 1826, and reported in 4 Martin's Reports, 399; Smith *v.* the *Creole* and the *Samson*, reported in 2 Wall., Jr., 485, and decided in the Circuit Court of the United States for the District of Pennsylvania in 1853; the *Lotty* Olcott, 329; *The Carolus*, 2 Curtis, 69; *The Marcellus*, 1 Cliff, 481; Yates *v.* Brown, decided by the Supreme Court of Massachusetts in 1828, and reported in 8 Pick. 23; Dennison *v.* Seymour, 9 Wend., 9; *The China*, 7 Wall., 53; *The Merrimac*, 14 Wall., 199; Atlee *v.* N. W. Packet Co., 21 Wall., 329; Sherlock *v.* Alling, 93 U. S., 99; and the *E. M. Norton*, 15 Fed. R., 386.

Before going into an extended analysis of these cases, it may be observed that in not one of them, except in the case of *The China*, was pilotage decided to be *compulsory*, and they all rested upon the principle and the fact (either expressly found or assumed) that the pilotage *not being compulsory*, the owners were liable for the acts of the pilot.

In the Circuit Courts in Massachusetts, as well as Pennsylvania (see the *Creole*, *supra*) it has been expressly held that the pilotage acts of those States, respectively, are *not compulsory*.

The Creole, 2 Wall., Jr., 485;
The *Marcellus*, 1 Cliff., 490.

And this Court, in the case of *The Merrimac*, 14

Wall., 199, held that the pilot act of Louisiana was not compulsory.

See also the *Carolus*, 2 Curtis, 69, where it is said that if the pilotage were *compulsory*, it would be *unjust to hold the shipowner*.

The *Carolus*, 2 Curtis, 69.

The earliest reported case in America is that of Bussy *v.* Donaldson, 4 Dall., 206, decided at *nisi prius* in the Supreme Court of Pennsylvania in 1800. In that case the important fact that the negligence was due *solely* to the pilot is wholly lacking. The plea was simply that the ship was *in charge of* a public pilot. This entirely destroys the application of the case to the one now under consideration; for even if the vessel was in charge of a compulsory pilot the negligence must be *solely* the negligence of the pilot, as found in the present case, in order to exempt the shipowner. The *Mobile*, Swabey Ad., 127; the *Diana*, 1 W. Rob., 132; S. C., 4 Moore, P. C., 11; Camp *v.* the *Marcellus*, 1 Clifford, 481. There was no pretence whatever that the pilot was *compulsory*. He was merely described as "a *public* pilot of the port;" and in the subsequent case of Smith *v. The Creole*, 2 Wall., Jr., 485, it was expressly decided in the United States Circuit Court that the Pennsylvania statute under which Bussy *v.* Donaldson was ruled was *not compulsory*. Furthermore, Bussy *v.* Donaldson was decided in the hurry of a jury trial, presumably without an exhaustive examination of the question, and certainly upon a meagre reference to the

authorities; and the case appears never to have been considered on a motion for a new trial, or by an appellate court. Its value, therefore, as an authority on a critical examination of the question is, therefore, of very little, if any, weight.

The next American case in point of time was Williamson *v.* Price, decided in the Supreme Court of Louisiana in 1826, and reported in 15 Martin, 399. In that case also it does not appear that the fault was exclusively the pilot's. The plea was that the vessel was "under the care and consequently under the control of a licensed pilot." There was also no finding that the pilot was *compulsory*. The defendant's plea was, as before stated, that their vessel was "under the care, consequently under the control of a *licensed* pilot," and there is not a syllable in the case to show that the Court considered the Louisiana Act as compulsory. The decision was, furthermore, based principally upon the authority of Bussy *v.* Donaldson, and the English case of the *Neptune*, the latter of which, as we have before shown, was subsequently overruled in England. It is true that the learned Judge said that "It seems hard, on the one side, that while necessity, and in *many places* the law, compel to place a vessel under the absolute command of a pilot," etc.; but this is not a finding that the Louisiana Act was compulsory; and this Court, in the case of the *Merrimac*, 14 Wall., 199, decided, as above stated, that the Louisiana Act was *not compulsory*. The Court also rests its decision partly upon the ground that

the pilot would be very seldom able to respond in damages—the unreasonable and exploded doctrine of *ab inconveniente*—which in New York can have no foundation, because the pilots are a chartered body, owning valuable vessels, and, therefore, furnishing ample means to which an injured party may resort. The legal effect of the case of Williamson *v.* Price, as well as Bussy *v.* Donaldson, therefore, is that the fact that a vessel is in *charge* of a *licensed* pilot does not exempt the owner.

The next case was Yates *v.* Brown, decided by the Supreme Court of Massachusetts in 1823, and reported in 8 Pickering, 23. In that case also *it does not appear that the fault was due to the pilot.* The report shows merely that a pilot was "*on board*," and that when the accident happened the vessel was "*under his charge.*" Furthermore, the report shows that the pilot was "*selected*" by the shipowner. Again the Court did not find that the Massachusetts law was *compulsory;* and in the case of the *Marcellus* (1 Clifford, 481) it was decided that the Massachusetts Act was *not compulsory.*

Denison *v.* Seymour, 9 Wend., 9, decided by the Supreme Court of New York in 1830, and cited by the counsel for the plaintiff in error was not a case of pilotage at all. It, therefore, has no application.

The next case in point of time was *Smith* v. *The Creole,* 2 Wall., Jr., 485. That was a libel *in rem,* and it is not contended in the present case that in suits *in rem* in the admiralty the ship is not liable.

The general discussion of the liability of the ship-owner *in personam* in the case of Smith *v. The Creole*, although interesting and instructive, and entitled to high respect, is, therefore, not an authority, but purely *obiter dicta*.

The same remarks are also applicable to the case of the *Lotty*, Olcott, 329, which, being a suit *in rem*, renders the general remarks of the Judge merely *obiter*. It was furthermore found that the fault was really the master's.

The next case is the *Carolus*, 2 Curtis, 69, decided by the U. S. Circuit Court for Massachusetts in 1854. In that case Judge Curtis held that "for a collision occasioned by the misconduct of a pilot, *employed by the owner not under any compulsion of Statute*, the *vessel* is liable." This was a suit *in rem*, and the learned Judge there makes the distinction we insist upon in this case, viz.: between *a compulsory* pilot and one *not compulsory*. He says: "*If the pilot of the ship had not been employed by the owner*, but had been received by the master, *in obedience to a requisition of law*, enforced by a penalty, then under the authority of Caruthers *v.* Sidebottom, 4 M. & S., 77, and the *Maria*, 1 Wm. Rob., 95, the *Agricola*, 2 *ib.*, 10, *the owners would seem not to be liable for the misconduct or misman agement of the pilot.*"

The counsel for the plaintiff in error cite in their brief *The Eliza* v. *The Decatur*, 2 Whart. Dig., 685. But it is apparent that case was a suit *in rem*, and the citation, therefore, has no authority. Moreover, the passage in Wharton's Digest is to the

effect that the mere fact that the vessel was "*in charge of a licensed pilot*," does not exempt the shipowner. As before seen, in discussing Bussy *v.* Donaldson, we do not dispute this.

The case of *The China*, 7 Wall., 53, has already been discussed. That was a case *in rem*, and therefore the remark in the opinion that the liability would be the same *in personam*, was purely *obiter*. Furthermore, the two English cases upon which the opinion in this respect mainly rested are no longer authority, one (*The Druid*) having been modified, and the other (*The Halley*) having been reversed.

The case of the *Merrimac*, 14 Wall., 199, was also a suit *in rem*. And this Court expressly found that the act providing for the pilot in that case was *not compulsory*. The Court, furthermore, emphasized the point we make here by saying: "Where the law is not enforced by any penalty it is not regarded as compulsory, and *if not compulsory* the defence that the ship was in charge of a pilot is not a valid defence," thus clearly intimating that the rule is otherwise if the pilot is *compulsory*.

In Atlee *v.* The Northwestern Union Packet Company, 21 Wall., 389, it does not even appear that the pilot was a licensed pilot, much less a compulsory one. He was, doubtless, one of what are known as "river pilots," selected and employed by the steamboat owner and engaged continuously. Of course such a pilot is the shipowner's servant.

In Sherlock *v.* Alling, 3 Otto., 99 (93 U. S.), the liability was upheld because the Court found that the Act of Congress in that case *expressly imposed it.* The counsel for the plaintiff in error complains that the referee "overlooked" this case, which we think an unfair charge, in respect to a case so obviously inapplicable.

The case of *The E. M. Norton*, 15 Fed. R., 686, was also a suit *in rem.* It also arose under the Louisiana statute which, as before seen, does not provide for compulsory pilotage. This case, therefore, is not applicable.

This, we believe, covers every case decided in America.

The foregoing review of the American decisions shows that, so far as the question involved in this case is concerned, they are in entire accord with the English cases.

And the distinctions pointed out between them and the present case show these results:

1. That Bussy *v.* Donaldson (4 Dall., 206), Williamson *v.* Price (15 Martin, 399), Yates *v.* Brown (8 Pick, 23), and Sherlock *v.* Alling (93 U. S., 99), the principal cases relied on by the plaintiff in error, (and the only decisions where suits were brought against the shipowner directly,) were cases where the pilots were licensed under statutes expressly declared to be *not compulsory;*

2. That in none of the American cases does the fault appear to have been the pilot's negligence exclusively;

3. That the dictum in the case of *The China* to the effect that the rule as to liability must be the

same *in personam* as in cases *in rem*, so far as the same rests upon the English cases, was based upon decisions since modified or reversed; and this dictum is now eliminated by the definition and scope of the case of the *China* as declared by this Court in the case of Ralli *v.* Troop, 157 U. S., 386 (*supra*); and

4. That all the other cases were suits *in rem*, where liability is not denied in this case, except Atlee *v.* Nor. Packet Co. (21 Wall., 389), where there was no suggestion that the pilot was compulsory or that he was any other than the chosen servant of the shipowner, and Sherlock *v.* Alling (3 Otto., 99, *supra*), which depended upon an Act of Congress expressly declaring the shipowner liable.

There is, therefore, not a single American case against the proposition set up in defense to this action. On the contrary, all the English cases and most of the American decisions either expressly, or by necessary implication, support it.

Sixteenth.

Aside from the fact that the American and English cases are in perfect harmony with each other on the question presented in this case, it is to be noted that a number of the English cases which were the basis *of dicta* in some of the American de-

cisions apparently against the contention of the defendant in error, have been overruled or reversed.

The learned referee in his opinion in this case (Record, fol. 27), among other things, says:

> "In England it is settled, after a good deal of discussion, that, independently of the statutes regulating the pilotage, and which exempt the owner from liability, the owner of a vessel cannot be held at common law personally liable for the negligence of a pilot whom the vessel is compelled to employ, for the reason that the ground of the liability of the owner for the negligence of those who navigate the vessel is based upon the relation between the owner and the parties guilty of negligence, of master and servant or principal and agent, and that as no such relation exists between the owner and the pilot who is imposed upon him by the superior authority of the State, the reason for the liability in case of a master or crew appointed by the owner ceases."

In another part of his opinion (Record, fol. 29) the learned referee again says:

> "In this country the question of the liability of the owner of a ship for the act of a compulsory pilot has received considerable discussion, but there appear to be only two cases in which the point has been directly de-

cided that the owner is liable *in personam* in such case. These are the cases of Bussy *v.* Donaldson, 4 Dall., 206, by the Supreme Court of Pennsylvania, decided in 1800, and Williamson *v.* Price, 4 Martin (N. S.), 399, decided in 1826 by the Supreme Court of Louisiana. There are *dicta*, however, to the same effect in other cases in this country, and especially in the case of the *China*, *supra*, where Mr. Justice Swayne, delivering the opinion of the Court, disapproves of the rule of the English cases, and cites with approval the case of Bussy *v.* Donaldson. The case of the *China*, however, was the case of a proceeding *in rem* against the vessel for damages from a collision caused by the fault of the pilot, and the decision stands upon a ground wholly independent of the personal liability of the owners."

It is thought that the learned referee might have attributed even less authority to the cases of Bussy *v.* Donaldson and Williamson *v.* Price, for in neither of those cases was pilotage found to be compulsory. Indeed, so far as the Pennsylvania statute is concerned, in the subsequent case of Smith *v.* the *Creole*, it was expressly held *not* to be compulsory (2 Wall., Jr., 485); and this Court, in the case of the *Merrimac* (14 Wall., 199), decided that the Louisiana Act was not compulsory.

Furthermore, the case of Williamson *v.* Price was decided partly upon the authority of the *Neptune the Second* (1 Dodson, 467), which was over-

ruled in England in the subsequent case of the *Eden* (2 W. Rob., 444, 445).

And in England, before the rule was established in favor of the exemption of the shipowner from liability for the negligence of a compulsory pilot, many of the cases were based upon the decision in the case of Attorney-General *v.* Case (3 Price, 302), the doctrine of which has been since overruled by the subsequent cases of General Steam Navigation Company *v.* British and Colonial Steam Navigation Company (L. R. 3 Ex., 330; S. C., affirmed L. R. 4 Ex. 238); and the *Charlton* (8 Asp. Mar. L. Cas., 29). So also, as we shall presently see, a dictum in the case of the *China* (7 Wall., 53), resting upon the case of the *Druid* (1 Wm. Rob., 399), loses all its value from the fact that the case of the *Druid* was afterward modified in England in the case of the *Bold Buccleugh* (3 Wm. Rob., 220). Again, in several of the American cases, the case of the *Halley* (L. R., 2 Ad. and Ecc., 3) is cited as an authority against the immunity of the shipowner in case of compulsory pilotage, notably in the cases of the *China* and the *Merrimac* (*supra*); but the case of the *Halley* was reversed in the Privy Council on appeal (L. R. App. Cas., 193). And Attorney-General *v.* Case, which, as before observed, has been overruled in England, was also cited in the cases of Williamson *v.* Price (4 Martin, *supra*) and Yates *v.* Brown (8 Pick., 23). In neither of these cases was pilotage found to be compulsory. As before observed, the Louisiana and Massachusetts statutes have been construed as *not* imposing com-

pulsory pilotage (the *Merrimac*, 14 Wall., 199, and the *Marcellus*, 1 Cliff., 495).

Seventeenth.

The dictum in the case of the *China* to the effect that the shipowner would also be liable *in personam* rested upon cases since overruled or reversed.

The case of *The China*, 7 Wall., 53, having been a proceeding *in rem* need not be discussed at length. There is a dictum in that case, however, to the effect that the same rule would obtain in actions *in personam;* but it is perfectly apparent that the learned Justice who delivered the opinion in that case, overlooked the distinction which we have pointed out, for though the New York Statute was found compulsory, yet without noticing the distinction in the precedents, the rule was referred to which the authorities held applicable only in cases where pilotage was adjudged *not compulsory.*

The dictum in the case of *The China* to the effect that the rule must be the same in actions *in personam* seems, furthermore, to rest upon the case of the *Druid*, 1 Wm. Rob., 399; but the rule stated in the case of the *Druid* was afterwards modified in the case of the *Bold Buccleugh*, 3 Wm. Rob., 220.

This Court, it will be observed, too, place

great stress in the case of *The China* on the judgment of Sir Robert Phillimore in the case of *The Halley* (L. R., 2 Ad. & Ecc., 3) and adopts his reasoning against the other cases considered; but the case of the *Halley* was afterwards reversed in the Privy Council, as we have before shown, and the principle for which we contend again affirmed (See L. R., 2 P. C. App. Cas., 193).

Furthermore, as will be seen from the extracts from the case of Ralli *v.* Troop, 157 U. S., 386 (*supra*) printed as part of the Ninth Point of this brief, the dictum in the *China* case referred to is now eliminated by the express declaration of this Court that the rule there laid down was limited to suits *in rem*, and that the rule at common law is different.

This dictum in the decision of *The China* is, therefore, of no authority whatever, and is for that reason to be treated as one of those general expressions which this Court itself has declared it will not be bound by.

See Cross *v.* Burke, 146 U. S., 87.

Eighteenth.

The authoritative text writers in this country uphold the doctrine that the ship owner is not liable in an action at common law for the negligence of a compulsory pilot.

The American text writers of authority who have

treated the subject of the liability of a ship owner for the negligence of a pilot are in entire accord with the cases which hold that the ship owner is not liable in cases of compulsory pilotage.

Mr. Justice Story, in his work on Agency (Section 456a), says:

> "From what has been already stated, the master of a ship, and the owner also, is liable for any injury done by the negligence of the crew employed in the ship. The same doctrine will apply to the case of a pilot, employed by the master or owner, by whose negligence any injury happens to a third person or his property; as, for example, by a collision with another ship, occasioned by his negligence. And it will make no difference in the case, that the pilot, if any is employed, is required to be a licensed pilot; provided the master is at liberty to take a pilot, or not, at his pleasure; for, in such a case, the master acts voluntarily, although he is necessarily required to select from a particular class. On the other hand, if it is compulsive upon the master to take a pilot, and *a fortiori*, if he is bound to do so under a penalty, then, and in such case, neither he, nor the owner, will be liable for injuries occasioned by the negligence of the pilot; for, in such a case, the pilot cannot be deemed properly the servant of the master or the owner, but is forced upon them; and the maxim, *Qui facit per alium facit per se*, does not apply."
>
> (Story on Agency, Sec. 456a).

Mr. Curtis, in his work on Merchant Seamen, (Boston, 1841), thus expounds the rule:

"The liability of the owners for the presumed trespasses of the master, is most frequently availed of by the injured party in cases of collision. The master being at all times the responsible agent of the owners, it is a general principle of law, that the owner's liability is not varied by the fact of the presence of a pilot, in whose control the actual navigation of the ship is for the time being; provided the master is not by statute compelled under a penalty to take a pilot on board. In such case, the taking the pilot is a voluntary act, and he becomes the servant of the owner. But if the master is by statute compelled to take a pilot, the owners are not responsible for his acts while the vessel is under his control. The reason of the distinction is this. The owner is responsible for the acts of the master and crew, because they are his agents, selected and appointed by him, and he is bound to provide persons of adequate skill, diligence, industry and sobriety, for the proper management of the vessel. For the same reason he is responsible for the acts of any person to whom the master voluntarily entrusts the navigation of the ship. But if the owner's authority is superseded by legislative authority, and a person is put on board whose qualifications the owner does not decide upon, but whose

qualifications are determined by others, it is only conformable to a principle of natural justice to hold the owner exempted from responsibility for the acts of such person."

(Curtis on Merchant Seamen, Boston, 1841, pp. 195, 196, 197.)

Nineteenth.

There is neither principle nor authority of law, nor is there any fair and equitable consideration upon which liability should be imposed upon the shipowner in this case.

A remarkable fact transpired at the trial of this case, and is referred to in the opinion of the referee (fol. 22 of the Record), and that was that the master of the *Bretagne* warned the pilot of the danger of collision after it was observed that the ship had ceased to turn down the river, but the pilot thought that she had still room to turn and avoid the collision, and for that reason he did not heed the master's suggestion that the ship should slow or stop, but went on, on his own responsibility, until it was too late to avoid the accident.

In other words, the only agent or servant of the shipowner in this case selected and put in command of this vessel showed a higher degree of prudence and caution—(a prudence and caution that would have avoided the collision)—than the pilot who had been forced upon the shipowner by compulsion of law.

Certainly, in a case like this, there is no equitable reason why the shipowner, through whose agents every measure of precaution was taken, should bear this loss.

On the contrary, not only because the rules of law afford no redress against the shipowner in this case, as abundantly appears from an examination of the authorities already considered, but also because it would be unjust in the extreme to allow the plaintiff in this case any recourse or remedy against anyone other than this incompetent and headstrong pilot, or the association to which he belongs, there should be no recovery in this action.

And, it is respectfully submitted, that the time has long gone by when the argument of convenience, resting upon the supposed inability of the pilot to respond in damages, should be applied. That argument is an illogical and unjust one at best, and in recent years, especially in large ports like that of New York, where pilots are banded together under a strong corporate organization and abundantly responsible and able to answer in damages, it should have no countenance whatever.

Lastly.

This Court should, for the foregoing reasons, direct the return of the first question certified as not being properly before the Circuit Court of Appeals, or that it should be answered in the affirmative, and as to the second question the answer should be in the negative.

EDWARD K. JONES,
Counsel for Defendant in error.

Supreme Court of the United States.

No. 166.—October Term, 1900.

The Homer Ramsdell Transportation Company, Plaintiff in Error, vs. La Compagnie Générale Transatlantique.	On a certificate from the United States Circuit Court of Appeals for the Second Circuit.

This was an action at law, brought by the Homer Ramsdell Transportation Company, a corporation of New York, against the Compagnie Générale Transatlantique, a corporation of the Republic of France, to recover damages caused by the defendant's steamship, the Bretagne, striking and injuring the plaintiff's pier in New York harbor.

The answer alleged, among other things, "that at the time of the said collision the said steamship La Bretagne was in the command, and her movements and navigation entirely under the orders and direction, of a pilot, duly licensed under, and compulsorily imposed upon the defendant by, the authority of the State of New York; and that the regular officers and crew of the said steamship in the service of the defendant had no part in the navigation of the said steamer except to carry out or execute the orders of the said pilot, which they did promptly and efficiently in every particular."

The case was referred by the Circuit Court of the United States for the Southern District of New York to Hon. William G. Choate, who reported in favor of the defendant, and filed an opinion published in 63 Fed. Rep. 848. That court gave judgment on his report for the defendant; and the plaintiff appealed to the Circuit Court of Appeals for the Second Circuit, which certified to this court, together with the pleadings, the judgment of the Circuit Court, and the report and opinion of the referee, the following statement of facts and questions of law:

"The defendant in error is a foreign corporation, owning and plying a regular line of steamers between Havre and New York. On the morning of December 10, 1892, one of the defendant's steamers, La Bretagne, while outward bound from the port of New York to Havre by way of Sandy Hook, with cargo and passengers, struck the plaintiff's pier, damaging it to the amount of upwards of thirteen thousand dollars. The said vessel, at the time she left her pier, was in all respects seaworthy and properly manned, equipped and supplied, and her owner exercised due diligence to make her so. She had on board a Sandy Hook pilot, duly licensed under and pursuant to the laws of the State of New York, and was navigated under his direction up to the time of said collision, and all his orders were promptly and efficiently obeyed and carried out by the master, officers and

crew of said steamship. The said collision and the damage resulting therefrom were caused solely by the negligence and want of skill and care on the part of the said pilot, and not by any want of skill or negligence on the part of the master, other officers, or crew of the said steamship.

"Certain questions of law arise in the cause concerning which the court desires the instructions of the Supreme Court for its proper decision, and which are as follows:

"First. Whether the provisions of chapter 467 of the laws of New York passed June 28, 1853, as amended by chapter 196 of the laws of said State passed April 11, 1854; chapter 243 of the laws of the said State passed April 3, 1857; chapter 930 of the laws of the said State passed May 16, 1867, and chapter 548 of the laws of said State passed May 2, 1870, and consolidated into sections 2093 to 2123, inclusive, of chapter 410 of the laws of said State passed July 1, 1882, impose compulsory pilotage on foreign vessels inward and outward bound to and from the port of New York by way of Sandy Hook, in view of the decisions of the New York Court of Appeals.

"Second. Whether in an action at common law the shipowner is liable for injuries inflicted exclusively by negligence of a pilot accepted by a vessel compulsorily."

[May 13, 1901.]

Mr. Justice GRAY, after stating the case, delivered the opinion of the Court.

The question whether the statutes of the State of New York impose compulsory pilotage on foreign vessels inward and outward bound to and from the port of New York by way of Sandy Hook depends, as both counsel admit, upon the true construction of the provisions which are copied in the margin.*

* The statute of 1854, c. 196, § 2, reënacted in the statute of 1882, c. 410, § 2100, provides that the commissioners of pilots "shall have the power to regulate the stationing of pilot boats for the purpose of receiving pilots from outward-bound vessels, may alter or amend any existing regulations of pilots, and make and duly promulgate and enforce new rules or regulations, not inconsistent with the laws of this State, or of the United States, which shall be binding and effectual upon all pilots licensed by them, and upon all parties employing such pilots. They may declare and enforce forefeitures of pilotage upon any mismanagement or neglect of duty by the pilots licensed by them; they may declare and impose and collect fines and penalties not exceeding two hundred and fifty dollars for each offence, to prevent any of the pilots licensed by them from combining injuriously with each other, or with other persons, and to prevent any person licensed by them from acting as a pilot during his suspension, or after his license may be revoked; and the said commissioners may establish and enforce all other needful rules and regu-

The statute of 1857, c. 243, reënacted in the statute of 1882, c. 410, § 2119, after providing how the master of a vessel sailing under a coasting license to or from the port of New York by the way of Sandy Hook, "desirous of piloting his own vessel," may obtain a license for such purpose from the commissioners of pilots, provides that every master of a foreign vessel bound to or from the port of New York by the way of Sandy Hook "shall take a licensed pilot, or, in case of refusal to take such pilot, shall himself, owners or consignees, pay the said pilotage, as if one had been employed, and such pilotage shall be paid to the pilot first speaking or offering his services as pilot to such vessel." It then goes on to provide that "any person not holding a license as pilot under this act," or under the laws of New Jersey, who shall pilot any vessel to or from the port of New York by the way of Sandy Hook, shall be punished by fine or imprisonment, and that "all persons employing a person to act as pilot, and not holding a license under this act," or under the laws of New Jersey, shall pay a fine.

By these provisions, not only is the master of a foreign vessel required to take a licensed pilot, or, in case of refusal to take such pilot, required to pay pilotage to the pilot first offering his services; but the subsequent provision as to any "person not holding a license under this act," construed in connection with the previous provision as to licensing the master of a coasting vessel as its pilot, evidently includes the master of a foreign vessel, and subjects him to fine or imprisonment if he pilots his own vessel.

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lations for the conduct and government of the pilots licensed by them, and the parties employing them; and they may enforce and receive accounts of all moneys collected for pilotage by the pilots licensed by them, and may impose and collect from such pilot a sum not exceeding three per cent on the amount thereof, to to defray their necessary expenses, including clerk hire and office rent."

By the statute of 1867, c. 930, also reënacted in the statute of 1882, c. 410, § 2100, "Any pilot bringing in a vessel from sea shall, by himself or one of his boat's company, be entitled to pilot her to sea when she next leaves the port, unless in the mean time a complaint for misconduct or incapacity shall have been made against such pilot, or one of his boat's company, and proved before the board of commissioners of pilots; provided, however, that if the owner of any vessel shall desire to change such pilot, then the said commissioners may assign any other pilot in the same pilot boat to pilot said vessel to sea."

The statute of 1857, c. 243, reënacted in the statute of 1882, c. 410, § 2119, provides as follows: "If the master of any vessel above one hundred and fifty and not exceeding three hundred tons burthen, and owned by a citizen of the United States, and sailing under a coasting license to or from the port of New York by the way of Sandy Hook, shall be desirous of piloting his own vessel, he shall first obtain a license for such purpose from the commissioners of pilots, who are hereby authorized and required to grant the same, if such master shall after an examination had by said commissioners be deemed competent; which said license shall be and continue in force one year from the date thereof, or until the determination of

The requirement to take a licensed pilot or pay pilotage, together with the penalty imposed on a master who pilots his own foreign vessel, clearly impose compulsory pilotage. And it was held by this court in *The China*, (1868) 7 Wall. 53, that the statute of 1857 imposed such pilotage.

The statute of 1867, c. 930, reënacted in the statute of 1882, c. 410, § 2100, enacts that a pilot bringing in a vessel from sea, may by himself or one of his boat's company, pilot her to sea when she next leaves the port; provided that if the owner shall desire to change the pilot, the commissioners of pilots may assign another one of the same pilot boat. But the right of the owner to object to one pilot does not make the selection of another by the commissioners a voluntary act of his.

The cases in the New York Court of Appeals, cited by the plaintiff, do not affect this question. In *Brown* v. *Ellworth*, (1875) 60 N. Y. 249, the only point decided was that a pilot licensed by the law of New Jersey could not recover pilotage under the statute of New York. And in *Gillespie* v. *Zittlosen*, (1875) 60 N. Y. 449, the only point decided was that the pilot first offering his services could not recover pilotage if the master took another licensed pilot.

The answer to the first question certified must therefore be that the statutes of New York do impose compulsory pilotage on foreign vessels,

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any voyage during which the license may expire. For such license, the master to whom it shall be granted shall pay to the said commissioners four cents per ton. All masters of foreign vessels and vessels from a foreign port, and all vessels sailing under register, bound to or from the port of New York by the way of Sandy Hook, shall take a licensed pilot, or, in case of refusal to take such pilot, shall himself, owners or consignees, pay the said pilotage as if one had been employed, and such pilotage shall be paid to the pilot first speaking or offering his services as pilot to such vessel. Any person not holding a license as pilot under this act, or under the laws of the State of New Jersey, who shall pilot, or offer to pilot, any ship or vessel to or from the port of New York by the way of Sandy Hook, except such as are exempt by virtue of this act, or any master or person on board a steam-tug or towboat, who shall tow such vessel or vessels, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by a fine not exceeding one hundred dollars or imprisonment not exceeding sixty days; and all persons employing a person to act as pilot, not holding a license under this act, or under the laws of the State of New Jersey, shall forfeit and pay to the board of commissioners of pilots the sum of one hundred dollars."

By the statute of 1854, c. 196, § 5, reënacted in the statute of 1882, c. 410, § 2120, "Any person not holding a license as pilot under this act, or under the laws of the State of New Jersey, who shall pilot or offer to pilot any ship or vessel to or from the port of New York by the way of Sandy Hook, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by a fine not exceeding one hundred dollars or imprisonment not exceeding sixty days; and all persons employing a person to act as pilot not holding a license under this act, or under the laws of the State of New Jersey, shall forfeit and pay to the board of commissioners of pilots the sum of one hundred dollars."

inward and outward bound to and from the port of New York by the way of Sandy Hook.

This action is at common law. It is not, and, being for damages inflicted on land, could not be, in admiralty. *The Plymouth*, (1865) 3 Wall. 20.

At common law, no action can be maintained against the owner of a vessel for the fault of a compulsory pilot.

In *Carruthers* v. *Sydebotham*, (1815) 4 M. & S. 77, 85, Lord Ellenborough, in holding that the act of the pilot was not the act of the master or mariners or owner of the ship, said: "Now to make the pilot the representative of the master, and consequently to exempt the underwriter from liability for his acts, it must first be shown that there is a privity between the pilot and the master, so that the one may be considered as the representative or agent of the other. But does the master appoint the pilot? Certainly not. The regulations of the general pilot act impose a penalty upon the master of every ship which shall be piloted by any other person than a pilot duly licensed, within any limits for which pilots are lawfully appointed. And there is an exception of such places for which pilots are not appointed. But if the master cannot navigate without a pilot except under a penalty, is he not under the compulsion of law to take a pilot? And if so, is it just that he should be answerable for the misconduct of a person whose appointment the provisions of the law have taken out of his hands, placing the ship in the hands and under the conduct of the pilot? The consequence is, that there is no privity between them."

In *Attorney General* v. *Case*, (1816) 3 Price, 302, 322, in the Court of Exchange, the master of the vessel whose owners were held liable, as the court said, "was not compellable, at that time, in any way, either under the penalty of double the wages, or of paying even the single wages, to have any pilot on board. It was his own act to have him; and it can be only in the case of such an officer having been forced upon them, and without his own election, that the responsibility of the owner can possibly be discharged."

In *The Maria*, (1839) 1 W. Rob. 95, 106, Dr Lushington, on a full review of those cases, held that upon general principles, and independently of the express provisions in the English statutes, the compulsory taking of a pilot relieved the owner from all responsibility for his acts.

In *Lucey* v. *Ingram*, (1840) 6 M. & W. 302, 315, Baron Parke, delivering the judgment of the Court of Exchequer, spoke of the exemption of the master, who was compelled to take a pilot, from liability by the common law, independent of statute, as follows: "It may, indeed, be admitted, that in many of the cases, the judges, in giving their judgments, refer to the obligation of the master to take a pilot, as the ground on which his irresponsibility is founded; and no doubt that is the foundation, and probably the only foundation, on which it can rest independently of the statutes;

but the language of the exempting clause in the last pilot act certainly carries the doctrine further, and it may well be conceived that this extension of the common law doctrine was not accidental, but intentional. The object of the legislature, in establishing pilots, has been to secure, as far as possible, protection to life and property, by supplying a class of men better qualified than ordinary mariners to take charge of ships in places where, from local causes, navigation is attended with more than common difficulty. To effect this object, it has in general been made the duty of the master of every ship, on arriving at any of the places in question, to take a pilot on board, and to give up to him the navigation of the vessel. The master, however well qualified to conduct the ship himself, is bound under a penalty in a great measure to divest himself of its control, and to give up the charge to the pilot. As a necessary consequence, the master and owners are exempted from responsibility for acts resulting from the mismanagement of the pilot." He then proceeded to consider the extension of the exemption by statute, which has no bearing on this case.

In *The Halley*, (1868) L. R. 2 P. C. 193, 201, the Judicial Committee of the Privy Council agreed with Sir Robert Phillimore in the same case in the Court of Admiralty, L. R. 2 Ad. & Ec. 3, "in his statement of the common law of England, with respect to the liability of the owner of a vessel for injuries occasioned by the unskillful navigation of his vessel, while under the control of a pilot, whom the owner was compelled to take on board, and in whose selection he had no voice; and that this law holds that the responsibility of the owner for the acts of his servant is founded upon the presumption that the owner chooses his servant and gives him orders which he is bound to obey, and that the acts of the servant, so far as the interests of third persons are concerned, must always be considered as the acts of the owner."

There is no occasion to refer further to the English cases in admiralty, because in England it is held that the ship is not responsible in admiralty, where the owner would not be at common law, differing in this respect from our own decisions. *The China*, 7 Wall. 53; *Ralli* v. *Troop*, (1894) 157 U. S. 386, 402, 423; *The John G. Stevens*, (1898) 170 U. S. 113, 120–122; *The Barnstable*, (1901) 181 U. S.

In *The China*, affirming the decision of the Circuit Court in admiralty, the liability of a vessel *in rem* for a collision from the fault of a compulsory pilot was put upon the maritime law, the court saying: "The maritime law as to the position and powers of the master, and the responsibility of the vessel, is not derived from the civil law of master and servant, nor from the common law." "According to the admiralty law, the collision impresses upon the wrongdoing vessel a maritime lien. This the vessel carries with it into whosesoever hands it may come. It is inchoate at the moment of the wrong, and must be perfected by subsequent proceedings."

"The proposition of the appellants would blot out this important feature of the maritime code, and greatly impair the efficacy of the system. The appellees are seeking the fruit of their lien." 7 Wall. 68.

Such was the view of that case taken by the whole court in *Ralli* v. *Troop*, in which the majority of the judges said of it: "That decision proceeded, not upon any authority or agency of the pilot, derived from the civil law of master and servant, or from the common law, as the representative of the owners of the ship and cargo;" "but upon a distinct principle of the maritime law, namely, that the vessel in whosesoever hands she lawfully is, is herself considered as the wrongdoer liable for the tort, and subject to a maritime lien for the damages." 157 U. S. 402. And the dissenting judges said that in *The China* "this court held, contrary to the English, but conformably to the continental authorities, that a vessel was liable for the consequences of a collision through the negligence of a pilot taken compulsorily on board, although it was admitted that, if the action had been at common law against the owner, and probably also *in personam* in admiralty, there could have been no recovery, as a compulsory pilot is in no sense the agent or servant of the owner." 157 U. S. 423.

In none of the cases in which actions at law have been maintained against the owner of a ship for the fault of a pilot was the owner compelled to employ the pilot.

In *Bussy* v. *Donaldson*, (1800) 4 Dall. 194, in the Supreme Court of Pennsylvania, an action on the case was brought against the owner of a ship for damages by collision; and the defence that the ship "was in the charge of a public pilot of the port (a person not the choice, nor the voluntary agent, of the owner) when the injury was committed," was overruled. But the statute of Pennsylvania, cited in that case, simply provided that the pilot first offering himself to any inward bound ship should be entitled to take charge of her; and that, if the master of any ship should refuse or neglect to take a pilot, the master, owner or consignee, should forfeit and pay a sum equal to half pilotage, to the use of the society for the relief of distressed and decayed pilots, their widows and children. Penn. Stat. April 11, 1793, §§ 8, 10; 3 Dall. Laws, 424, 426. The subsequent pilot laws of Pennsylvania have made similar provisions. *Cooley* v. *Board of Wardens*, (1851) 12 How. 299. And the Supreme Court of Pennsylvania has held that they did not make the employment of a pilot compulsory, saying: "The legislature have wisely decided not to compel the owners to supply one, but have permitted them, if they please, to compound by paying half pilotage, for the benevolent and beneficial purpose of relieving distressed and decayed pilots, their widows and children. The act sets out an inducement to avail themselves of their services, but does not compel them to do so." *Flanigen* v. *Washington Ins. Co.*, (1847) 7 Penn. St. 306, 312. And see *The Creole*, (1853) 2 Wall. Jr. 485, 516, 517.

So in *Williamson* v. *Price*, (1826) 4 Martin (N. S.) 399, the Supreme Court of Louisiana maintained an action for a collision by a vessel "at the time under the care and consequently the control of a licensed pilot." But the statutes of Louisiana, likewise, only provided that "if the master of any ship or vessel coming to the port of New Orleans shall refuse to receive on board and employ a pilot, the master or owner of such ship or vessel shall pay to such pilot, who shall have offered to go on board and take charge of the pilotage of the vessel, half pilotage." Law of Territory of Orleans of March 31, 1805, § 17, p. 140; Louisiana Rev. Stat. 1853, p. 457, § 17; Rev. Stat. 1856, pp. 403, 404, §§ 9, 19. And this court has held that those statutes are not compulsory. *The Merrimac*, (1871) 14 Wall. 199, 203.

In *Yates* v. *Brown*, (1829) 8 Pick. 22, in the Supreme Judicial Court of Massachusetts, in which the owners of a vessel were held liable for a collision by the fault of a pilot, it is only stated that he was duly authorized to pilot the ship, that he held his commission under the executive authority of the Commonwealth, and that the owners had selected him for this service. And in Massachusetts, as has been observed by its court, "the statute does not make it incumbent on the master of a vessel, subject to pilotage, to receive a pilot, if he chooses to navigate her himself," although it makes him and the owner liable to pay full pilotage fees if a pilot offers his services and they are refused. *Martin* v. *Hilton*, (1845) 9 Met. 371, 373.

In *Denison* v. *Seymour*, (1832) 9 Wend. 1, in the Supreme Court of New York, the taking of a pilot was not compulsory, and the court said: "The officer here called the pilot is not the same as the pilot recognized in the laws regulating foreign commerce."

In *Atlee* v. *Packet Co.*, (1874) 21 Wall. 389, which was a suit *in personam* in the admiralty, where the owners of a vessel were held liable for the fault of a pilot, it does not appear that they acted under compulsion in appointing him, and the question of their liability for his acts was not discussed.

In *Sherlock* v. *Alling*, (1876) 93 U. S. 99, the case came to this court on writ of error from the Supreme Court of the State of Indiana, and therefore none but Federal questions were within the jurisdiction of this court; and the only questions decided, or which could have been decided, were that an act of Indiana making any person liable for the death of another caused by his wrongful act or omission was not, as applied to a tort committed on navigable waters within the State, an encroachment on the commercial powers of Congress; and that an act of Congress making the master and owners of a vessel liable for injuries to passengers under certain circumstances afforded no defence to the action.

The liability of the owner at common law for the act of a pilot on his vessel is well stated by Mr. Justice Story in his Treatise on Agency, (2d

ed.) § 456*a*: "The master of a ship, and the owner also, is liable for any injury done by the negligence of the crew employed in the ship. The same doctrine will apply to the case of a pilot, employed by the master or owner, by whose negligence any injury happens to a third person or his property; as, for example, by a collision with another ship, occasioned by his negligence. And it will make no difference in the case, that the pilot, if any is employed, is required to be a licensed pilot; provided the master is at liberty to take a pilot, or not, at his pleasure; for, in such a case, the master acts voluntarily, although he is necessarily required to select from a particular class. On the other hand, if it is compulsive upon the master to take a pilot, and, *a fortiori*, if he is bound to do so under a penalty, then, and in such case, neither he, nor the owner, will be liable for injuries occasioned by the negligence of a pilot; for, in such a case, the pilot cannot be deemed properly the servant of the master or the owner, but is forced upon them, and the maxim, *Qui facit per alium facit per se*, does not apply."

The answer to the second question must therefore be that in an action at common law the shipowner is not liable for injuries inflicted exclusively by negligence of a pilot accepted by a vessel compulsorily.

Answer to the first question in the affirmative; to the second in the negative.

True copy.

Test:

Clerk Supreme Court, U. S.